EXHIBIT 6

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TEXAS
(AUSTIN DIVISION)

In re: **UTEX COMMUNICATIONS CORP. d/b/a FEATUREGROUP IP,** **Debtor.**	**Chapter 11** **Case No. 10-10599-CAG**

MOTION FOR RELIEF FROM STAY BY THE UNIVERSAL SERVICE ADMINISTRATIVE COMPANY

THIS PLEADING REQUESTS RELIEF THAT MAY BE ADVERSE TO YOUR INTERESTS.

IF NO TIMELY RESPONSE IS FILED WITHIN FOURTEEN (14) DAYS FROM THE DATE OF SERVICE, THE RELIEF REQUESTS HEREIN MAY BE GRANTED WITHOUT A HEARING BEING HELD

A TIMELY FILED RESPONSE IS NECESSARY FOR A HEARING TO BE HELD.

To the Honorable Craig A. Gargotta, United States Bankruptcy Judge:

NOW COMES Universal Service Administrative Company ("USAC"), by and through its undersigned counsel, and hereby moves this Court, pursuant to 11 U.S.C. § 362(d)(1) and Local Bankruptcy Court Rule 4001-1, for relief from the automatic stay, to the extent relief may be required, to allow USAC to proceed in the ordinary course of business with respect to USAC's administration of the Universal Service Fund (the "USF"). As discussed in further detail below, USAC believes relief is unnecessary but, to the extent necessary, "cause" is present and should be granted pursuant to 11 U.S.C. § 362(d)(1).

In support hereof, USAC respectfully states as follows:

I. FACTUAL AND PROCEDURAL BACKGROUND.

On March 3, 2010 (the "Petition Date"), the Debtor filed a voluntary petition pursuant to Chapter 11 of the United States Bankruptcy Code, 11 U.S.C. §§ 101-1532 (the "Bankruptcy Code"), in the United States Bankruptcy Court for the Western District of Texas, Austin Division, commencing Case No. 10-10599-CAG.

1. The Debtor continues to operate its business as a "debtor-in-possession" pursuant to Bankruptcy Code §§ 1107 and 1108.

2. As set forth herein, USAC holds certain claims against the Debtor stemming from both the prepetition and administrative periods.

A. Establishment of Universal Service Support Mechanisms and Description of USAC.

3. In the 1996 Telecommunications Act. P.L. 104-104 (the "Telecommunications Act"), Congress authorized the creation of federal universal service support mechanisms whereby eligible providers of telecommunications services to customers in high cost areas, low income customers, rural health care centers, schools and libraries could obtain financial support for providing approved telecommunications services to such customers. 47 U.S.C. § 254(h)(l). Congress directed that funding for these universal service support mechanisms be obtained by requiring telecommunications carriers that provide interstate and international telecommunications services to the public to make mandatory contributions to a Universal Service Fund (i.e., the USF). 47 U.S.C. § 254(d).

4. USAC is a not-for-profit Delaware corporation that administers the federal universal service support programs and the USF under the oversight of the Federal Communications Commission (the "FCC"). See 47 C.F.R. § 54.701(a). As such, USAC is responsible for the collection of contributions to the USF and the distribution of universal service support payments

from the USF to eligible providers of telecommunications services. 47 U.S.C. § 54.702(b). The FCC's regulations directed the formation of USAC, 47 C.F.R. § 54.701, set the composition of USAC's board of directors, 47 C.F.R. § 54.703, described the internal organization of the company, 47 C.F.R. § 54.701, and established the functions and responsibilities of USAC in administering the USF and the universal service support mechanisms, 47 C.F.R. § 54.702. USAC has no authority to promulgate or waive regulations governing the USF, or to interpret unclear regulations. 47 C.F.R. § 54.702(c). If questions concerning USAC's authority under the FCC's regulations arise, they must be referred to the FCC for determination. Id.

B. The Mandatory USF Contribution Procedure.

5. The USF is funded through mandatory contributions from all U.S. telecommunications carriers based on, inter alia, a percentage of their interstate and international end-user telecommunications revenues. 47 C.F.R. § 54.709(a). The FCC directs all U.S. telecommunications carriers to submit such information to USAC on a quarterly and annual basis, using a "Telecommunications Reporting Worksheet," which is also known as a Form 499. 47 C.F.R. § 54.711. The Telecommunications Reporting Worksheet and Accompanying Instructions (the "Worksheet Instructions") are published in the Federal Register and set forth detailed reporting requirements concerning the information carriers are required to submit to USAC. Id. Where a telecommunications carrier fails to submit a Telecommunications Reporting Worksheet to USAC by the form's due date, federal regulations require USAC to assess USF obligations and issue invoices based on available information, including historical interstate and international end-user telecommunication revenue. 47 C.F.R. § 54.709(d).

6. Upon receiving and reviewing each carrier's quarterly Telecommunications Reporting Worksheet (the "Quarterly Revenue Report" or "Form 499-Q"), USAC calculates

each carrier's quarterly USF obligation for the upcoming quarter and then invoices each carrier for its contributions to the USF in three monthly installments (the "USF Obligations"). USAC deposits the contributions into the USF for distribution to eligible recipients of the universal service support programs pursuant to FCC rules. [1]

7. In April each year, carriers must report annual revenue data for the prior calendar year on an annual Telecommunications Reporting Worksheet (the "Annual Revenue Report" or "Form 499-A"), which USAC then uses to perform a "true-up" by comparing the Annual Revenue Report to the previously filed Quarterly Revenue Reports (the "Annual True-Up"). If a carrier's reported annual revenue is less than the sum of the revenue reported previously for that year on the Quarterly Revenue Reports, USAC issues Annual True-Up credits to that carrier. Alternatively, if a carrier's reported annual revenue is greater than reported on the carrier's Quarterly Revenue Reports, USAC issues Annual True-Up adjustments to that carrier. These Annual True-Up credits or adjustments generally appear in three equal amounts on the July, August and September invoices of that subsequent year. A similar process is followed in the event a carrier timely revises an Annual Revenue Report.

8. Carriers are entitled to downwardly amend Annual Revenue Reports for up to one year after that form's initial due date. [2] Carriers must upwardly amend Annual Revenue Reports

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[1] The four Federal universal service support programs are: High Cost; Low Income; Rural Health Care; and Schools and Libraries.

[2] *See In re Federal-State Joint Board on Universal Service, 1998 Biennial Regulatory Review – Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Service, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms, Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, CC Docket Nos. 96-45, 98-171, 97-21, Order, 20 FCC Rcd., 1012, 1016-18, ¶¶ 10-14 (2004) (adopting one-year revision deadline for downward revisions to Annual Revenue Reports).

any time a carrier discovers, or USAC learns, that the carrier's revenues increased from the amounts previously reported.[3]

9. The regulations also provide USAC with authority to audit contributors and carriers that report data. 47 C.F.R. § 54.707. As directed by the regulations, USAC has established procedures to verify discounts, offsets, and support amounts provided by the universal service support programs. Id. The regulations further provide that USAC may suspend or delay discounts, offsets, and support amounts provided to a carrier if the carrier fails to provide adequate verification of discounts, offsets, or support amounts upon reasonable request. Id.

10. If a carrier filed for bankruptcy protection during the year covered by the Annual True-Up, USAC calculates the adjustments or credits that are appropriately associated with the prepetition period. After all of the credits or adjustments have posted to a carrier's account (generally by October of each year), USAC reverses the prepetition portion of the credits or adjustments and files a corresponding amendment to its prepetition proof of claim.

C. The Source of USF Contributions.

11. Many telecommunications carriers pass the cost of their monthly contributions to the USF directly on to their customers through a surcharge or other line item that identifies the USF, in some manner, on the customers' bills. Accordingly, in most cases, funding for the USF comes from customers (in many cases, individual consumers) rather than from the operations of the telecommunications carrier. The FCC's rules (47 C.F.R. § 54.712) authorize a carrier to recover these charges from the customer, but the FCC's rules also provide that the amount recovered by the carrier from its customers may not exceed the interstate telecommunications portion of the customer's bill multiplied by the quarterly contribution factor established by the FCC. The

[3] Id.

carrier's ability to recover USF contributions from its customers is not intended to provide the carrier, or a postpetition debtor, with a windfall.

12. If funds collected from a carrier's customers as a USF surcharge are not deposited in the USF, but are retained by the carrier, such action would constitute a violation of 47 C.F.R. § 54.712 and the FCC's Truth-in-Billing rules. 47 C.F.R. § 64.2401.

13. Therefore, to the extent that a carrier, including a debtor in bankruptcy, collects USF contributions from end-users, those funds collected are not property of the Debtor's estate, based on, among other provisions, 47 U.S.C. § 254(d) and 47 C.F.R. §§ 54.706, 54.712, and 64.2401.

D. The Debtor's Contributions and USF Credit.

(i) The Debtor's Original 499-A Form.

14. Prior to the Petition Date, the Debtor submitted certain Annual Revenue Reports to USAC. USAC processed all such reports in accordance with the applicable federal laws and regulations.

15. On March 31, 2009, the Debtor filed its 2009 FCC Form 499-A, reporting its actual revenue for calendar year 2008 (the "Original 499-A Form"). On that Original 499-A Form, the Debtor reported a gross universal service contribution base amount of $1,212,847, of which $1,203,352 constituted interstate revenue and, therefore, was subject to federal universal service contribution obligations.

16. The Debtor's Original 499-A Form was comparable to prior Form 499-A filings submitted annually by the Debtor as well as the revenue projected by the Debtor on its Quarterly Revenue Reports corresponding to calendar-year 2008. USAC reviewed and approved the Original 499-A Form on April 14, 2009 and conducted the 2009 Annual True-Up, "true-ing up"

annual revenue for calendar year 2008, based on the information certified by the Debtor on the Original 499-A Form.

17. The 2009 Annual True-Up based on the Original 499-A Form resulted in a slight increase in USF Obligations (i.e., true-up adjustments) in the amount of $816.93.

(ii) The Revised 499-A Form.

18. On July 6, 2009, the Debtor submitted to USAC a revised 2009 FCC Form 499-A (the "Revised 499-A Form"). Upon receipt of the Revised 499-A Form, USAC recalculated the 2009 Annual True-Up in the ordinary course. The Revised 499-A Form substantially reduced the Debtor's reported gross federal universal service contribution base (i.e., from $1,212,847 to $129,089) and its reported interstate revenue (i.e., from $1,203,352 to $119,594). USAC initially processed the Revised 499-A Form in the ordinary course and, as a result of the decreased revenue reported by the Debtor, USAC calculated total credits of $104,023.11 in connection with the 2009 Annual True-Up. If the Debtor's Revised 499-A Form was acceptable, the value of the resulting USF credit through the Petition Date would be $131,995.57, up from $27,155.55 based on the revenue reported in the Debtor's Original 499-A Form.

19. Due to the significant discrepancies between the Debtor's Revised 499-A Form and its Original 499-A Form, however, USAC attempted to verify the information contained in the Debtor's Revised 499-A Form.[4]

20. Consistent within USAC's standard review of the Debtor's Revised 499-A Form, USAC repeatedly attempted to contact the Debtor to request an explanation for the notable and significant revenue discrepancies. USAC's efforts to obtain information necessary to substantiate the information contained in the Revised 499-A Form are detailed in USAC's letter

to the Debtor of April 8, 2011 (the "April 8, 2011 Letter"), a copy of which is attached hereto as **Exhibit A**.

21. Notably, USAC first contacted the Debtor regarding the revenue discrepancies by email on August 11, 2009, more than one and a half years prior to the April 8, 2011 Letter and, as detailed therein, USAC continued to inquire of the Debtor through various methods, throughout that period.

22. At one point, in an email from Mr. Joe Martinec, dated June 8, 2010, the Debtor acknowledged USAC's inquiries, and, in that email, Mr. Martinec stated that "[t]he information [USAC] requested below is being gathered. However, I am in the middle of drafting a disclosure statement and plan. My need for broader information is taxing the support staff of the Debtor, but I should be through in a few days." See, April 8, 2011 Letter, p. 2. Despite Mr. Martinec's assurances in his email, USAC received no further information or documentation from the Debtor from the date of that email (i.e., June 8, 2010) through the date of USAC's April 8, 2011 Letter.

(iii) USAC's Rejection of the Revised 499-A Form.

23. After actively but unsuccessfully seeking information from the Debtor for approximately 20 months, USAC sent its April 8, 2011 Letter notifying the Debtor that USAC had rejected the Revised 499-A Form due to the Debtor's failure to provide any further information to corroborate or verify the substantial and unsupported revenue changes reported in the Revised 499-A Form. See **Exhibit A**. The April 8, 2011 Letter also advised the Debtor that due to the rejection of the Revised 499-A Form, USAC had recalculated the value of the USF

[4] Notably, the revenue information contained in the Revised 499-A Form differed substantially from (a) prior Annual Revenue Reports submitted by the Debtor and (b) the Quarterly Revenue Reports submitted by the Debtor throughout 2008 projecting revenue for the same exact time period.

credit associated with the prepetition period based on the Original 499-A Form and, as a result, the aggregate USF credit related to the prepetition period now totals $27,155.55.

24. The letter further indicated that the Debtor had two possible administrative remedies available if it wished to dispute USAC's decision to reject of the Revised 499-A Form: (i) it could respond to USAC and provide the requested information to support the Revised 499-A Form in writing no later than 30 calendar days from the date of the letter; or (ii) it could appeal USAC's decision to the FCC. To date, the Debtor has failed to properly exercise either of its two readily available administrative options.

(iv) Debtor's Response and Automatic Stay Allegations.

25. Instead of availing itself of its available administrative options, the Debtor responded to USAC's April 8, 2011 Letter with a letter dated April 27, 2011, a copy of which is attached hereto as **Exhibit B** (the "April 27, 2011 Response"). In its April 27, 2011 Response, the Debtor appears to dispute USAC's authority to reject the Revised 499-A Form. The Debtor also expounds at great length regarding litigation between the Debtor and the "Texas PUC".[5] Notably, the Texas PUC is unrelated to USAC, and USAC is not a party to the litigation referenced by the Debtor in the April 27, 2011 Response. Notwithstanding the Debtor's excessive commentary regarding the various telecommunications policies of the Texas PUC, the April 27, 2011 Response is essentially non-responsive to USAC's inquiries regarding the significant revenue discrepancies in connection with the Revised 499-A Form.

26. Of concern to USAC, however, is the Debtor's assertion in the April 27, 2011 Response that by rejecting the Revised 499-A Form, USAC "unilaterally reduces a credit due to

[5] Although not defined in the April 27, 2011 Response, it appears that "Texas PUC" refers to the Public Utility Commission of Texas, an entity which, according to its website, administers the Texas Universal Service Fund ("TUSF"). The TUSF is unrelated to the Federal USF which is exclusively administered by USAC subject to FCC oversight.

[the Debtor] by USAC in the form of prepetition overpayments, and directly impacts 'property of the estate.'" The Debtor further alleges in the April 27, 2011 Response that USAC's administration of the USF violates the automatic stay provisions of Bankruptcy Code § 362.

27. After levying these significant allegations regarding USAC's purported violation of the stay, the Debtor concludes the April 27 Letter with the following suggestions:

> a. Although we do not yet agree to do so, we are also willing to discuss the potential and propriety of using the FCC administrative process to secure a decision by the FCC, at least on an initial basis, subject to ultimate approval, oversight and (if and to the extent is appears reasonable and lawful) implementation of the decision for purposes of FeatureGroup IP's plan of reorganization; and
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> b. [The Debtor] suggests that the parties meet and confer on this complicated set of issues. We can attempt to reach a negotiated result that could then be presented to the bankruptcy court for approval and ultimately implementation in the plan of reorganization. Alternatively, we can discuss the appropriate venue and process for resolution by regulatory or judicial authorities. FeatureGroup IP is relatively indifferent to which regulatory theory prevails; and
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> c. Because this issue is critical to the outcome of FeatureGroup IP's reorganization efforts, and because of the regulatory agencies' inability to reach a consistent treatment of this issue, lack of consensual resolution will result in a proceeding in the Bankruptcy Court.

April 27, 2011 Response, p. 5.

28. As set forth below, USAC disputes the Debtor's assertion that the automatic stay is implicated by USAC's administration of the USF as that administration is authorized and directed by, inter alia, the Telecommunications Act, regulations set forth in 47 C.F.R. § 54, and relevant FCC orders. Furthermore, even if the automatic stay applied to this situation, grounds for relief exist and are compelling and USAC, therefore, requests that relief be granted. This Motion is filed as a precautionary motion only and serves the purpose of bringing this dispute to

the Court's attention and seeking a ruling concerning the applicability of the automatic stay to this matter.

II. ARGUMENT.

A. The Automatic Stay Is Inapplicable to USAC's Administration of the USF.

(i) Until the Established Administrative Review Process is Complete, Jurisdiction Resides with the FCC.

29. There is an established administrative procedure for the Debtor to challenge USAC's quantification of USF obligations and any credits thereof. The procedures require Debtor to seek an administrative review of USAC's actions as described in USAC's April 7, 2011 Letter.

30. Under the regulatory scheme promulgated by the FCC for the administration of the USF mechanisms, a person aggrieved by an action of USAC in connection with the administration of the USF is required to first exhaust the administrative review mandated by the FCC's rules. If the Debtor is still unsatisfied with the FCC's final decision in such an appeal, the sole avenue for judicial review is the U.S. Court of Appeals. See 47 U.S.C. §§ 155(c)(4); 402.

31. Thus far, the Debtor has failed to even initiate the administrative review process that is required by the FCC's authorizing statute and the implementing regulations.

32. "No one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy is exhausted." Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50-51 (1938). Pursuant to its Congressional mandate to supervise the USF administrator, the FCC adopted regulations creating an administrative appeal process to address alleged errors by USAC in the administration of the USF. 47 C.F.R. Part 54, Subpart I. This process provides for appeals to USAC, the supervising FCC bureau, and to the FCC itself. To deviate from this scheme and allow other courts or bodies to intervene in USAC's administrative

decisions would subject USAC to an incomprehensible and unmanageable body of conflicting case law. Such an outcome would undermine Congress's intent to have USAC administer the UFS consistently throughout the United States. Thus, administrative exhaustion principles must be respected and enforced in this case. See Rhodes v. U.S., 574 F.2d 1179, 1181 (5th Cir. 1978) (general rule is that litigants are required to exhaust administrative remedies, if such remedies exist, as a prerequisite to invoking the jurisdiction of the federal courts); see also Visiting Nurse Assoc. of Tampa Bay, Inc. v. Sullivan, 121 B.R. 114, 118 (Bankr. M.D. Fla. Oct. 30, 1990) (bankruptcy court would not determine dispute over Medicare payments between debtor provider, fiscal intermediary, and Secretary of Health and Human Services, prior to exhaustion of administrative remedies).

33. Section 54.719(c) of the FCC's rules states that "[a]ny person aggrieved by an action taken" by USAC "may seek review from the Federal Communications Commission, as set forth in § 55.722." 47 C.F.R. § 54.719(c). The Telecommunications Act dictates the manner in which this appeal must take place. Section 5(c) of the Act authorizes the FCC to delegate responsibilities to entities or employees within the Commission, such as one of its bureaus. 47 U.S.C. § 155(c)(1). Subsection (c)(4) further provides that a person aggrieved by an action of the bureau on delegated authority "may file an application for review by the Commission." Id. If the party seeking review is dissatisfied with the Commission's decision, it may appeal to the courts of appeal. Accordingly, bankruptcy and district courts have no jurisdiction to review FCC decisions, or to hear collateral attacks on FCC orders. See FCC v. ITT World Commc'ns, Inc., 466 U.S. 463, 464, 468 (1984). Moreover, § 405 of the Communications Act prohibits judicial review of an issue upon which the FCC has had no opportunity to pass. 47 U.S.C. § 405.

34. "The basic purpose of the exhaustion doctrine is to allow an administrative agency to perform functions within its special competence – to make a factual record, to apply its expertise, and to correct its own errors so as to moot judicial controversies." Parisi v. Davidson, 405 U.S. 34, 37 (1972). The exhaustion principle serves four purposes: (1) it ensures that plaintiffs do not flout legally established administrative processes; (2) it protects the autonomy of federal agency decision-making; (3) it aids judicial review by permitting factual development of issues relevant to the dispute; and (4) it promotes judicial economy by avoiding repetitious administrative and judicial fact-finding and by resolving some claims without judicial intervention. McKart v. U.S., 395 U.S. 185, 193 (1969); Weinberger v. Salfi, 422 U.S. 749, 765 (1979) (Exhaustion of administrative remedies is generally required as a matter of preventing premature interference with agency processes, so that the agency may function efficiently, and so that it may have an opportunity to correct its own errors, to afford the parties and the courts the benefit and expertise, and to compile a record which is adequate for judicial review.).

35. The FCC adopted the administrative appeal process in 47 C.F.R. § 54.719(c) for the express purpose of maintaining supervision over USAC's administration of the USF. Accordingly, it is essential to USAC's ability to adhere to the regulatory scheme laid out by the FCC to have review of its actions conducted by the FCC alone. If this Court excuses the Debtor from exhausting the established administrative review process, then this Court will ultimately be ruling on, among other things, (i) classification of telecommunications revenue for the purpose of administering the USF and, (ii) whether the Debtor's 2009 Revised Form 499-A complies with the regulatory requirements established and reviewed by the FCC. This, in turn, would undermine the ability of USAC to conform its administration of the USF to the FCC's regulatory scheme.

36. The Court should also consider that Congress delegated oversight of the USF and the related support mechanisms to the FCC, due to its special expertise in promoting and regulating the expanded availability of telecommunications services. If this Court were to intervene in the FCC's oversight of the universal service administration, without first providing the FCC the opportunity to review and correct any error through the process initiated by a proper appeal, the Court would improperly undermine the autonomy of the FCC to regulate this aspect of interstate telecommunications.

37. Lastly, interpretation of its own rules concerning the administration of the USF and related mechanisms authorized by the Communications Act is a matter well within the expertise of the FCC, and does not require expenditure of judicial resources.

38. The ability of the FCC to provide USAC with consistent guidance in interpretation of the FCC's rules and directives is essential to USAC's ability to effectively administer the mandatory contributions to the USF. This Court should not pre-empt the FCC's opportunity to provide that guidance should the Debtor determine that review is required.

39. Several district courts have considered whether administrative remedies must be exhausted before bringing a court action alleging that USAC has erred in its administration of the USF. These cases have dismissed such actions against USAC on the grounds that the plaintiff failed to exhaust its administrative remedies before bringing suit. Achieve Telecom Network of MA, L.L.C. v. Universal Service Admin. Co., Civil Action No. 09-10315, slip op. (D. Mass. Oct. 29, 2009) (complaint against USAC alleging wrongful withholding of payments dismissed on grounds that plaintiff had failed to exhaust its administrative appeals to the FCC before filing its action in federal court because "[e]xhaustion is mandatory under the regulations."); Integrity Comm., Ltd. v. Universal Service Admin. Co., Civil Action No. B-08-

29, slip op. (S.D. Tex. 2008) (failing to exhaust administrative remedies at the FCC before initiating a case against USAC disputing its administration of the USF required that the case be dismissed with prejudice); Computer Consulting & Network Design, Inc. v. Universal Service Admin. Co., 2008 WL 2435932, at *6, (W.D. Ky. 2008) ("After considering the nature of the regulatory scheme, the purposes to be served by the exhaustion doctrine, and in the exercise of judicial discretion, the Court concludes that [the plaintiff] should have exhausted its administrative remedies prior to seeking relief here."); Self v. Bellsouth Mobility, Inc., No. 2:98-2581, slip op. at 11, 15 n.7 (N.D. Ala. Sept 29, 2006) (dismissing third-party complaint because third-party plaintiff could "apply for review by the FCC" from a USAC decision, and pursuit of "administrative procedures are prerequisite to judicial review").

40. In addition, the Bankruptcy Court for the Central District of California recently dismissed an action by a Chapter 11 debtor against USAC due to the Debtor's failure to exhaust its administrative remedies. Pacific Centrex Services, Inc. v. Universal Service Admin. Co., Civil Action No. 09-01516, slip op. (Bankr. C.D. Cal. Mar. 2, 2010) (bankruptcy court dismissed action by debtor seeking turnover of USF credits after USAC's rejection of untimely 499-A forms for lack of subject matter jurisdiction due to debtor's failure to exhaust administrative remedies by pursuing the appropriate FCC appeal process).

41. At its core, the Debtor's April 27, 2011 Response essentially stems from the fact that the Debtor disagrees with USAC's decision to reject the Revised 499-A Form. The Debtor's argument rests on the assumption that the FCC would agree with the Debtor's interpretation of (i) how the Debtor has attempted to classify its telecommunications services and (ii) the extent to which portions of the revenue are eligible for inclusion in the universal service contribution base.

The FCC, however, is the appropriate body to consider and decide those issues. The Debtor has failed, thus far, to initiate the appropriate appeal to the FCC.

42. Absent the appropriate appeal, the FCC, whose interpretation of its own regulations must be given substantial deference in light of its experience, Trinity Broad. Of Fla., Inc. v. FCC, 211 F.3d 618, 625 (D.C. Cir. 2000), would be precluded from this opportunity to pass on the issues raised by the Debtor in the first instance. Accordingly, principles of administrative exhaustion require that the Debtor seek relief before the FCC.

(ii) USAC Is Entitled to Exercise Its Right of Recoupment Without Violating the Automatic Stay.

43. As described in detail above, it is USAC's responsibility to determine the USF obligations of telecommunications carriers on a quarterly basis based on projected revenue provided by the carrier. After year end, carriers must submit to USAC actual revenue for the calendar year, which USAC uses to "true up" against the obligations invoiced for the same time period. If the carrier under-projected revenue during the calendar year, USF adjustments result from the Annual True-Up process and USAC invoices additional USF charges to the carrier. If the carrier over-projected revenue during the calendar year, USAC credits the carrier's invoice to the extent necessary to account for the reduced USF obligations. The process is one of "recoupment" because the adjustments or credits that result from the Annual-True Up arise from a single transaction (i.e., the reconciliation of revenue for the calendar year).

44. The common law doctrine of recoupment "'allows a defendant to reduce the amount of a plaintiff's claim by asserting a claim against the plaintiff which arose out of the same transaction to arrive at a just and proper liability on the plaintiff's claim.'" Matter of Kosadnar, 157 F.3d 1011, 1013-14 (5th Cir. 1998), *quoting* United States Abatement Corp. v. Mobil Exploration & Producing U.S., Inc. (In re United States Abatement Corp.), 79 F.3d 393, 398 (5th

Cir.1996) (quoting Holford v. Powers (In re Holford), 896 F.2d 176, 178 (5th Cir.1990) (internal quotations omitted)).

45. Unlike setoff, which allows a creditor to offset a prepetition debt with a mutual prepetition debt, recoupment transcends the filing of a petition and allows a creditor to offset a prepetition debt with a mutual postpetition debt. See, e.g., Davidovich v. Welton (In re Davidovich), 901 F.2d 1533, 1537 (10th Cir.1990).

46. Significantly, recoupment is not affected by the automatic stay, nor is exercising the equitable right a violation of the discharge injunction. In re Akincibasi, 372 B.R. 80, 84; In re Jones, 289 B.R. 188, 191-92 (Bankr. M.D. Fla. 2002). Further, recoupment is not subject to the requirements of § 553. In re Anes, 195 F.3d 177, 182 (3rd Cir. 1999).

47. As discussed in Kosadnar, there are essentially two requirements to satisfy regarding recoupment. First, the recouping party must have provided some type of "overpayment" in the context of the transaction at issue. Second, both the original overpayment and the amount to be recouped must arise from a single contract or transaction. Matter of Kosadnar, at 1014; Photo Mechanical Servs., Inc. v. E.I. DuPont De Nemours & Co. (In re Photo Mechanical Servs., Inc.), 179 B.R. 604, 613-14 (Bankr. D. Minn.1995).

48. Indeed, this Court recently reviewed the elements of recoupment and noted that "[a]t its core, recoupment is an equitable right where the creditor's claim against the debtor arises out of the same transaction as the debtor's claim." In re Eggers, 432 B.R. 577, 582 (Bankr. W.D. Tex. 2010), citing, In re Vaughter, 109 B.R. 229, 233 (Bankr. W.D. Tex. 1989).

49. As applied to this case, USAC's provision of a substantial USF credit based on the Debtor's Revised 499-A Form constitutes an "overpayment" from the USF because, inter alia, USAC has determined that the Revised 499-A Form is insufficient and must be rejected.

Further, both the original overpayment (i.e., the Annual True Up results based on the now-rejected Revised 499-A Form) and the amount to be recouped (i.e., the reversal of those credits based on the rejection of the Revised 499-A Form) arise from the same transaction, namely, total USF obligations resulting from revenue generated by the Debtor during calendar year 2008.

50. As a result of USAC's entitlement to "recoup" the overpayment caused by the now-rejected Revised 499-A Form, the automatic stay is not implicated.

B. If Automatic Stay Is Applicable, "Cause" Exists for Relief.

51. Although USAC believes that the automatic stay is inapplicable to USAC's quantification of USF obligations in ordinary course of its administration of the USF, the Debtor raised the issue in its April 27, 2011 Response. As a result, USAC seeks relief from the stay herein, to the extent this Court determines relief is required. Bankruptcy Code Section 362(d)(1) provides that, after notice and hearing, a bankruptcy court shall grant relief from the automatic stay for "cause." Here, USAC is entitled to relief from the automatic stay for cause under § 362(d)(1).

52. The Bankruptcy Code does not define the term "cause", and therefore the question of whether cause exists to lift the automatic stay must be decided on a case-by-case basis. See Matter of Reitnauer, 152 F.3d 341, 343 n.4 (5th Cir. 1998); In re MacDonald, 755 F.2d 715, 717 (9th Cir. 1985); see also In re Sonnax Industries, Inc., 907 F.2d 1280, 1285-1286 (2nd Cir. 1990) (given the multitude of factors at issue on whether the stay should be lifted, the "decision of whether to lift the stay is committed to the discretion of the Bankruptcy Court"). For many of the reasons discussed above, cause exists in this case.

53. Factors generally looked to in determining whether to modify automatic stay for cause include interference with bankruptcy, good or bad faith of debtor, injury to debtor and

other creditors if stay is modified, injury to movant if stay is not modified, and proportionality of harms from modifying or continuing stay. In re Milne, 185 B.R. 280, 283 (Bankr. N.D. Ill. 1995).

54. In this case, the USAC is engaged in the administrative function of reviewing and processing the Debtor's Annual Revenue Reports. Pursuant to applicable regulatory authority, USAC has rejected the Debtor's Revised 499-A Form. USAC first provided the Debtor with multiple opportunities to address the deficiencies in the Revised 499-A Form, but the Debtor declined to do so.

55. To the extent that USAC is prohibited by the automatic stay from processing, and thereby rejecting, the Debtor's Revised 2009 Form 499-A, there will be no mechanism for the FCC to address the many issues raised by the Debtor in its April 27, 2011 Response.

56. USAC is without authority to waive regulations governing the USF, or to interpret unclear regulations. If questions concerning USAC's authority under the FCC's regulations arise, they must be referred to the FCC for determination. 47 C.F.R. § 54.702(c).

57. Here, pursuant to the April 8, 2011 Letter, USAC notified the Debtor of its right to either provide support for its Revised 499-A Form or to appeal to the FCC USAC's decision to reject the Revised 499-A Form to the FCC.

58. To date, the Debtor has failed to exercise either remedy in order to attempt to establish the credit amount to which it believes it is entitled.

59. In this case, the balance of harms weighs in favor of granting relief to USAC to allow the administrative appeal to proceed, should the Debtor choose to do so. Absent an appeal or other exhaustion of the Debtor's remedies, there will be no resolution of the issues raised by the Debtor.

60. Further, because the Debtor remains engaged in the telecommunications business, the issue is also likely to arise in the future.

61. On the other hand, granting relief from the automatic stay and upholding its rejection of the Debtor's Revised Filing, subject to administrative review, does not deprive the Debtor of the opportunity to seek the full amount of credit to which it believes it may be entitled. Accordingly, the Debtor can and should be required to pursue the credit by appeal to the FCC which is the only competent body to address the issues referenced by the Debtor in its April 27, 2011 Response.

62. Since it is within the Debtor's control to obtain from the FCC the revenue it purportedly seeks, it can hardly be prejudiced by a finding from this Court that it must exhaust its existing administrative remedies before.

63. For the foregoing reasons, this Court should exercise its discretion and grant USAC relief from the automatic stay, if relief is necessary, and allow USAC to administer the USF within the existing regulatory scheme provided by the Telecommunications Act, and existing federal regulations.

WHEREFORE, USAC respectfully requests that this Court issue an Order:

A. Granting relief from the automatic stay to the extent necessary;

B. Ordering the Debtor to exhaust its administrative remedies regarding USF appeals; and

C. Granting the USAC such other and further relief as is just.

Respectfully submitted,

UNIVERSAL SERVICE
ADMINISTRATIVE COMPANY

By its counsel,

Dated: May 26, 2011

/s/ Keith M. Aurzada

Keith M. Aurzada
Texas State Bar No. 24009880
Bryan Cave, LLP
2200 Ross Ave., Suite 3300
Dallas, TX 75201
Phone: 214-721-8053
Fax: 214-220-6753
Email: keith.aurzada@bryancave.com

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on May 26, 2011, a copy of the foregoing was served on the following:

Johnathan C. Bolton
Fulbright & Jaworski L.L.P.
1301 McKinney, Suite 5100
Houston, TX 77010
713-651-5151
713 651 5246 (fax)
jbolton@fulbright.com

William H. Daniel
McGinnis, Lochridge & Kilgore
600 Congress Ave. Suite 2100
Austin, TX 78701
512-495-6016
512-505-6316 (fax)
bdaniel@mcginnislaw.com

Melissa A. Haselden
Hoover Slovacek, LLP
5847 San Felipe
Suite 2200
Houston, TX 77057
713.977.8686
713.977.5395 (fax)
Haselden@hooverslovacek.com

James V. Hoeffner
Graves, Dougherty, Hearon & Moody, P.C.
401 Congress Avenue
Suite 2200
Austin, TX 78701
(512) 480-5707
(512) 480-5886 (fax)
jhoeffner@gdhm.com

Cara S. Kelly
Munsch Hardt Kopf & Harr, PC
401 Congress Ave., Suite 3050
Austin, TX 78701
512-391-6125
512-226-7113 (fax)
ckelly@munsch.com

Joseph D. Martinec
Martinec, Winn, Vickers & McElroy, P.C.
600 Congress Avenue, Suite 500
Austin, TX 78701
(512) 476-0750
(512) 476-0753 (fax)
martinec@mwvmlaw.com

Rhonda Mates
Brown McCarroll, LLP
111 Congress Ave., Ste. 1400
Austin, TX 78701
512-479-9765
512-481-4808 (fax)
rmates@mailbmc.com

Brown McCarroll LLP
c/o Rhonda Mates
111 Congress Avenue
Suite 1400
Austin, TX 78701
512-479-9765
512-481-4808 (fax)
rmates@mailbmc.com

E Stuart Phillips
Bankruptcy Division
P. O. Box 12548
MC-008
Austin, TX 78711-2548
(512) 463-2173
stuart.phillips@oag.state.tx.us

David A. Rosenzweig
Fulbright & Jaworski
666 Fifth Ave
New York, NY 10103-3198
212-318-3000
drosenzweig@fulbright.com

Edward L. Rothberg
Hoover Slovacek, LLP
5847 San Felipe, Suite 2200
Houston, TX 77057
(713) 977-8686
713 977-5395 (fax)
rothberg@hooverslovacek.com

Patricia Baron Tomasco
Jackson Walker LLP
100 Congress Avenue
Suite 1100
Austin, TX 78701
(512) 236-2076
(512) 691-4438 (fax)
ptomasco@jw.com

/s/ Keith M. Aurzada
Keith M. Aurzada

Westlaw

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C
Only the Westlaw citation is currently available.

United States District Court, W.D. Kentucky, Owensboro Division.
COMPUTER CONSULTING & NETWORK DESIGN, INC., Plaintiff,
v.
UNIVERSAL SERVICE ADMINISTRATIVE COMPANY, Defendant.

No. 4:08-cv-9.
June 12, 2008.

Ridley M. Sandidge, Jr., Reed Weitkamp Schell & Vice, PLLC, Louisville, KY, for Plaintiff.

Jonathan T. Cain, Rebecca Geller, Mintz Levin, Washington, DC, Matthew Porter Cook, Cole & Moore, PSC, Bowling Green, KY, for Defendant.

MEMORANDUM OPINION AND ORDER
JOSEPH H. McKINLEY, JR., District Judge.

***1** This matter is before the Court on a Motion to Dismiss by Defendant Universal Service Administrative Company (USAC). [DN 11]. Plaintiff alleges claims of defamation and tortious interference with contract, but Defendant asserts that the claims must be dismissed for a failure to state on a claim on which relief may be granted. Fully briefed, this matter is ripe for decision.

I. Facts

Plaintiff Computer Consulting & Network Design, Inc. (CCND) is an internet service provider. Defendant Universal Service Administrative Company (USAC) is a non-profit corporation designated by the Federal Communications Commission (FCC) to administer a program through which schools and libraries can obtain discounted internet service. The program is called the E-rate program, and was created by the Telecommunications Act of 1996, *47 U.S.C. § 254(h).*

School districts can apply to receive discounted services by filing a form (Form 470) with USAC, requesting discounted services. USAC then posts that form application on its website for a minimum of 28 days, during which time internet service providers may submit bids indicating they would like to provide the requested services. The school district may then enter a contract for services with one of the service providers, and price must be the primary factor in selecting a provider. The E-Rate program provides the greatest discounts and supplements to those schools that have the greatest need, with need being determined according to the number of students in the school that qualify for free or reduced cost lunches.

After a school district has entered a contract with a service provider, a second form (Form 471) is filed with USAC to request discounted services. USAC then assigns the request a funding request number (FRN) and later issues a funding commitment decision letter (FCDL) to approve or deny the discounted services. There can be a substantial time lapse between the request for funding and USAC's decision granting or denying funding.

FCC rules forbid service providers from participating in the bidding process. Thus, USAC developed a procedure to help detect improper provider involvement in the bidding. USAC describes this as "pattern analysis," and the procedure helps discover similarities in applications that might result from the involvement of a service provider in the submission of the funding request.

Plaintiff CCND provides internet services to school districts in Kentucky and Tennessee. The Muhlenberg County School District (Muhlenberg), Hopkins County School District (Hopkins), Huntingdon Special School District (Huntingdon), and Hollow Rock Bruceton Special School District (Hollow Rock), all exist in Kentucky or Tennessee and all applied for discounted services through the E-rate program administered by USAC. Each of

these school districts entered contracts for services with CCND in January and February of 2004. In 2005, each school district filed Form 471 with USAC requesting funding for services that were to be provided by CCND.

***2** In April, 2007, USAC notified each of the school districts in writing that its pattern analysis had revealed that the school districts' applications in Form 471 shared similarities with other CCND clients, implying that CCND participated in the completion or posting of each schools Form 470 that had initially solicited bids for services under the E-rate plan. Immediately after this notification, Hollow Rock canceled its contract with CCND. Muhlenberg, Hopkins, and Huntingdon were given the opportunity to respond to USAC and explain the similarities, and the school districts were to identify any persons who helped prepare the Form 470. [See DN 12, Exhibits 1-4]. In July, 2007, following the response of the school districts, USAC notified Muhlenberg, Hopkins, and Huntingdon via e-mail and public posting on USAC's website that each school's request for funding was denied because a competitive bidding violation involving CCND had occurred. [See DN 12, Exhibits 5-7].

CCND alleges that the communications to the school districts implying a violation of FCC competitive bidding rules were false and defamatory, and that USAC interfered with existing and prospective contractual relationships between CCND and each of the school districts. USAC filed a Rule 12(b)(6) Motion to Dismiss arguing that CCND's failure to exhaust administrative remedies is fatal to its claims.

II. Legal Standard

Upon a motion to dismiss for failure to state a claim pursuant to Fed.R.Civ.P. 12(b)(6), the Court "must construe the complaint in the light most favorable to [the plaintiff], accept all well-pled factual allegations as true and determine whether [the plaintiff] undoubtedly can prove no set of facts consistent with [its] allegations that would entitle [it] to relief." *League of United Latin American Citizens v. Bredesen,* 500 F.3d 523, 527 (6th Cir.2007) (citing *Kottmyer v. Maas,* 436 F.3d 684, 688 (6th Cir.2006)). This standard requires more than bare assertions of legal conclusions. *Bovee v. Coopers & Lybrand C.P.A.,* 272 F.3d 356, 361 (6th Cir.2001). A plaintiff must provide the grounds for his entitlement to relief and this "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action." *Bell Atlantic Corp. v. Twombly,* 127 S.Ct. 1955, 1965 (2007); *Bredesen,* 500 F.3d at 527. "The factual allegations, assumed to be true, must do more than create speculation or suspicion of a legally cognizable cause of action; they must show entitlement to relief." *Id.* (citing *Twombly,* 127 S.Ct. at 1965). "To state a valid claim, a complaint must contain either direct or inferential allegations respecting all the material elements to sustain recovery under some viable legal theory ." *Id.* (citing *Twombly,* 127 S.Ct. at 1969).

III. Discussion

USAC primarily argues that suit in this Court is not proper because CCND did not exhaust its administrative remedies before bringing suit. CCND responds that administrative exhaustion was not necessary in this case because it would not provide adequate remedies. CCND submits that the statements made by USAC were defamatory, and that USAC sufficiently interfered with contractual relations between CCND and the school districts to warrant monetary damages for the tort. While USAC presents alternative arguments in support of its motion to dismiss, the Court finds the matter of exhaustion to be dispositive, and therefore, only this issue will be addressed.

A. Principles of the Exhaustion of Administrative Remedies

***3** The doctrine of administrative exhaustion is a prudential doctrine. The exhaustion requirement ensures that the agency with the most expertise in a particular field is allowed the first attempt to resolve a claimant's issues. See *Idaho Sporting Congress, Inc. v. Rittenhouse,* 305 F.3d 957, 965 (9th Cir.2002); *Saulsbury Orchards & Almond Pro-*

cessing, Inc. v. Yeutter, 917 F.2d 1190, 1195 (9th Cir.1990). The primary purposes of the exhaustion requirement are to protect administrative agency authority and to promote efficiency, since "[c]laims generally can be resolved much more quickly and economically in proceedings before an agency than in litigation in federal court." *Fazzini v. Northeast Ohio Correctional Center,* 473 F.3d 229, 232 (6th Cir.2006).

The principles of administrative exhaustion were well explained by the Supreme Court in *McCarthy v. Madigan,* 503 U.S. 140, 144-45 (1992):

> This Court long has acknowledged the general rule that parties exhaust prescribed administrative remedies before seeking relief from the federal courts. See, e.g., *Myers v. Bethlehem Shipbuilding Corp.,* 303 U.S. 41, 50-51, and n. 9 (1938) (discussing cases as far back as 1898). Exhaustion is required because it serves the twin purposes of protecting administrative agency authority and promoting judicial efficiency.
>
> As to the first of these purposes, the exhaustion doctrine recognizes the notion, grounded in deference to Congress' delegation of authority to coordinate branches of Government, that agencies, not the courts, ought to have primary responsibility for the programs that Congress has charged them to administer. Exhaustion concerns apply with particular force when the action under review involves exercise of the agency's discretionary power or when the agency proceedings in question allow the agency to apply its special expertise. *McKart v. United States,* 395 U.S. 185, 194 (1969). See also *Bowen v. City of New York,* 476 U.S. 467, 484 (1986). The exhaustion doctrine also acknowledges the commonsense notion of dispute resolution that an agency ought to have an opportunity to correct its own mistakes with respect to the programs it administers before it is haled into federal court. Correlatively, exhaustion principles apply with special force when "frequent and deliberate flouting of administrative processes" could weaken an agency's effectiveness by encouraging disregard of its procedures. *McKart v.. United States,* 395 U.S., at 195.
>
> As to the second of the purposes, exhaustion promotes judicial efficiency in at least two ways. When an agency has the opportunity to correct its own errors, a judicial controversy may well be mooted, or at least piecemeal appeals may be avoided. See, e.g., *Parisi v. Davidson,* 405 U.S. 34, 37 (1972); *McKart v. United States,* 395 U.S. at 195. And even where a controversy survives administrative review, exhaustion of the administrative procedure may produce a useful record for subsequent judicial consideration, especially in a complex or technical factual context. See, e.g., *Weinberger v. Salfi,* 422 U.S. 749, 765 (1975) (exhaustion may allow agency "to compile a record which is adequate for judicial review").

***4** The Supreme Court's explanation of the exhaustion doctrine demonstrates that the waiver of the exhaustion doctrine should not be taken lightly. The Sixth Circuit has similarly explained that the doctrine requiring the exhaustion of administrative remedies "must be applied in each case with an understanding of its purposes and the particular administrative scheme involved ... exhaustion is not required if administrative remedies are inadequate or not efficacious; [or] where pursuit of administrative remedies would be a futile gesture." *Shawnee Coal Co. v. Andrus,* 661 F.2d 1083, 1093 (6th Cir.1981)(internal citations omitted).

B. Is Exhaustion Required?

USAC has its own provisions for administrative remedies and appeals. The method of appeal for USAC decisions is explained in 47 C.F.R. § 54.719(c):

> Any person aggrieved by an action taken by a division of the Administrator, as defined in § 54.701(g), a Committee of the Board of the Administrator, as defined in § 54.705, or the Board of Direcors of the Administrator, as defined in § 54.703, may seek review from the Federal Communications Commission, as set forth in §

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54.722.

Thus, any action taken by USAC may be administratively appealed to the FCC, in addition to USAC's internal appeal mechanisms which can also be utilized. *47 C.F.R. § 54.719(a)* and *47 C.F.R. § 54.719(b)*. Based on the simple language of § 54.719, it is apparent that CCND had the opportunity to appeal USAC's actions and funding denial to USAC or the FCC.

USAC argues that exhaustion is mandatory citing cases from two circuits which have so held despite the use of the permissive term "may" as used here. See, e.g. *Kobleur v. Group Hospitalization and Medical Services, Inc.*, 954 F.2d 705, 709 (11th Cir.1992)("[A]gency regulations promulgated under the authority of the statute may create an exhaustion requirement despite the absence of such a requirement within the text of the statute."); *Kennedy v. Empire Blue Cross and Blue Shield*, 989 F.2d 588, 592 (2d Cir.1993)("The Exhaustion requirement may arise from explicit statutory language or from an administrative scheme providing for agency relief."). CCND takes issue with the mandatory claim citing the permissive language of the regulation that a party aggrieved by USAC *"may* seek review from the Federal Communications Commission." 47 *C.F.R. § 54.719(c)* (emphasis added).

"Of 'paramount importance' to any exhaustion inquiry is congressional intent. Where Congress specifically mandates, exhaustion is required. But where Congress has not clearly required exhaustion, sound judicial discretion governs." *McCarthy v. Madigan*, 503 U.S. 140, 144 (1992) (internal citations omitted). Here, the statutory language states that an aggrieved party may seek review with the FCC. *47 C.F.R. § 54.719(c)*. While the statute does not indicate that exhaustion is mandatory, a Court may decide whether prudence demands that administrative remedies be exhausted in a particular case. "In situations in which 'the meaning of [regulatory] language is not free from doubt,' the reviewing court should give effect to the agency's interpretation so long as it is 'reasonable,' " *Martin v. OSHRC*, 499 U.S. 144, 150 (1991) (quoting *Ehlert v. United States*, 402 U.S. 99 (1971)). Further, "[i]t is a well settled principle that where Congress establishes a special statutory review procedure for administrative action, that procedure is generally the exclusive means of review for those actions." *Greater Detroit Resource Recovery Authority v. United States Environmental Protection Agency*, 916 F.2d 317, 321 (6th Cir.1990).

***5** In addition to the provisions for USAC review in § 54.719, the FCC has further provisions for administrative review in *47 U.S.C. § 405(a)*. [FN1] This demonstrates that Congress and the FCC recognize that the FCC can best address the specialized matters handled and regulated by the FCC. To satisfy exhaustion under *§ 405*, the FCC itself, and not merely an FCC bureau, must have had the opportunity to consider an issue. *Coalition for Noncommercial Media v. FCC*, 249 F.3d 1005, 1009 (D.C.Cir.2001). Further demonstrating this specialized nature, appeals of FCC decisions are to be taken directly to the Court of Appeals, entirely bypassing the district courts. *47 U.S.C. § 402*.[FN2] Under the current statutory construction, the lower courts are not intended to examine FCC issues. Explaining the FCC review, the D.C. Circuit has stated, "Section 405 of the Communications Act provides that the Commission [the FCC] must be afforded an 'opportunity to pass' on an issue as a condition precedent to judicial review." *Bartholdi Cable Co., Inc. v. F.C.C.*, 114 F.3d 274, 279 (D.C.Cir.1997). While the judicial review provisions of § 405 contain no exceptions on their face, the D.C. Circuit has construed it to leave "room for the operation of sound judicial discretion to determine whether and to what extent judicial review of questions not raised before the agency should be denied." *Washington Ass'n for Television and Children v. F.C.C.*, 712 F.2d 677, 681 (D.C.Cir.1983), quoting *Action for Children's Television v. F.C.C.*, 564 F.2d 458, 469 (D.C.Cir.1977).

FN1. (a) After an order, decision, report, or

> action has been made or taken in any proceeding by the Commission, or by any designated authority within the Commission pursuant to a delegation under section 155(c)(1) of this title, any party thereto, or any other person aggrieved or whose interests are adversely affected thereby, may petition for reconsideration only to the authority making or taking the order, decision, report, or action; and it shall be lawful for such authority, whether it be the Commission or other authority designated under section 155(c)(1) of this title, in its discretion, to grant such a reconsideration if sufficient reason therefor be made to appear. A petition for reconsideration must be filed within thirty days from the date upon which public notice is given of the order, decision, report, or action complained of. No such application shall excuse any person from complying with or obeying any order, decision, report, or action of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. The filing of a petition for reconsideration shall not be a condition precedent to judicial review of any such order, decision, report, or action, except where the party seeking such review (1) was not a party to the proceedings resulting in such order, decision, report, or action, or (2) relies on questions of fact or law upon which the Commission, or designated authority within the Commission, has been afforded no opportunity to pass. *47 U.S.C. § 405(a).*
>
> FN2. "Appeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases ..." *47 U.S.C. § 402(b).*

The FCC regularly processes appeals and requests for review under *47 C.F.R. § 54.719.* See, e.g. *In the Matter of Request for Review of the Decision of the Universal Service Administrator by Education Legislative Services,* 2004 WL 241448 (F.C.C.), 19 F.C.C.R. 2387 (Feb. 11, 2004); In *the Matter of Request for Review Lake Erie Educational Computer Association Elyria, Ohio,* 2004 WL 224689 (F.C.C.), 19 F.C.C.R. 2159 (Feb. 6, 2004). The FCC rulings indicate that the Commission is well-versed in the technicalities of USAC administration and deals with appeals of USAC matters regularly.

USAC primarily argues that efficient administration of USAC programs requires the enforcement of the exhaustion doctrine in this case. First, USAC submits that the FCC adopted the administrative appeal process of *47 C.F.R. § 719(c)* in order to maintain supervision over the administration of USAC. USAC submits that efficient administration of the E-rate program requires that the FCC be the primary appellate body for USAC decisions, otherwise USAC could be subject to various tort liabilities in different jurisdictions based on the jurisdictional case law.

USAC further submits that the FCC's interpretation of its rules and directives are entitled to great deference by this Court. And USAC finally argues that Congress has directed that judicial review of FCC decisions is exclusively delegated to the Courts of Appeals, as noted above. See *Bartholdi Cable Co., Inc. v. F.C.C.,* 114 F.3d 274, 279 (D.C.Cir.1997).

***6** After considering the nature of the regulatory scheme, the purposes to be served by the exhaustion doctrine, and in the exercise of judicial discretion, the Court concludes that CCND should have exhausted its administrative remedies prior to seeking relief here. CCND's claims all hinge upon the allegation that USAC's conduct in administering the E-Rate Program was "improper, wrongful, unlawful and reckless." USAC contends that the FCC has issued orders to USAC approving and requiring the conduct complained of herein. Thus, in order to

address CCND's claims in this case, it would be necessary to determine the propriety of the actions taken by USAC in the administration of the program. The agencies have the expertise to address these matters. The facts indicate that USAC and the FCC have a complete and adequate administrative review process in place. They should be given the opportunity to pass on the issues underlying CCND's claims prior to judicial review. If this Court and other courts across the country were to intervene in USAC matters, a delirious web of case law could be created. Exhaustion principles apply with great force when their disregard could weaken the effectiveness of agency procedure. *McCarthy v. Madigan,* 503 U.S. at 14.

C. Futility

CCND submits that its claims are tort matters and its damages monetary, neither of which can be addressed within the administrative process. While this is true, administrative review does allow for a full and complete look at USAC's conduct. Thereafter, an aggrieved party may obtain judicial review by a Court of Appeals.

If it was determined administratively that USAC acted in accordance with proper FCC directives and the Court of Appeals agreed, this Court would be bound by that conclusion and CCND's claims would not be viable. If it was determined that USAC's conduct was wrongful or illegal, then arguably, CCND would have viable state law claims. However, the determination of whether USAC acted in accordance with proper FCC directives is a matter which is squarely within the realm of the FCC and the Courts of Appeals, not this Court.

Furthermore, as noted above, when an agency has the opportunity to correct its own errors, a judicial controversy may be avoided. Thus, it cannot be said that exhaustion in a case such as this is futile.

IV. Conclusion

For the foregoing reasons, exhaustion of administrative remedies is required. Therefore, USAC's Motion to Dismiss is hereby GRANTED [DN 11].

W.D.Ky.,2008.
Computer Consulting & Network Design, Inc. v. Universal Service Administrative Co.
Not Reported in F.Supp.2d, 2008 WL 2435932 (W.D.Ky.)

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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 09-10315-RWZ

ACHIEVE TELECOM NETWORK OF MA, LLC

v.

UNIVERSAL SERVICE ADMINISTRATIVE COMPANY

ORDER

October 29, 2009

ZOBEL, D.J.

Plaintiff Achieve Telecom Network of MA, LLC ("Achieve") brings this action against the Universal Service Administrative Company ("USAC"), alleging interference with business relations (Counts I-III); defamation (Count IV); and seeking a declaratory judgment that Achieve is entitled to be paid for the approved discount services it provided (Count V). Defendant has moved to dismiss pursuant to Rule 12(b)(6) for failure to state a claim and failure to exhaust administrative remedies.

I. Background

Plaintiff, a Nevada limited liability company with offices in Canton, Massachusetts, provides telecommunications service, including internet service, to customers throughout Massachusetts, including several school districts. Defendant USAC is a Delaware not-for-profit corporation designated by the Federal Communications Commission ("FCC") to be the administrator of the "Universal Service

Fund's School and Libraries Service Support Mechanism" Program (known as "E-Rate"), which provides financial support to fund internet access for students in elementary and secondary schools and public libraries. See 47 U.S.C. § 254(b)(6).

The E-Rate program is the subject of a number of regulations promulgated by the FCC. See 47 C.F.R. Part 54 (Subpart F). To be admitted into the E-Rate program, a participant school or library seeking discounted telecommunications service fills out an FCC application form setting forth the services for which it intends to use discounts and submits the form to USAC. See 47 C.F.R. § 54.504(b)(c). The applicant must comply with the FCC's competitive bidding requirements and then enter into an agreement with internet service providers for eligible services. See 47 C.F.R. § 54.504(a). It must then notify the USAC of the services ordered, the service provider selected, and the funds needed to cover the discounted portion of services. See 47 C.F.R. § 54.504(c).

By regulation, the E-Rate program requires participants, such as school districts, to pay the service provider the portion of the service cost not covered by the program. See 47 C.F.R. § 54.514. In essence, the program provides participants a "discount" rather than paying funds directly to them. Thus, participants have two options: (1) pay the service provider's bill in full and seek reimbursement of the discount portion from USAC through the service provider; or (2) pay the non-discount portion of the service cost to the service provider and require the service provider to obtain payment of the balance from USAC. See 47 C.F.R. § 54.514. The regulations were expressly drafted to provide for funding in this manner so that "[b]y limiting each eligible entity's ability to

receive support for internal connections, recipients will have greater incentive not to waste program resources...." 69 Fed. Reg. 27 at 6182, ¶9 (Feb. 10, 2004).

Here, four participant school districts in Massachusetts (Brockton, Springfield, Chelsea and Somerville) applied to USAC for discounted services under the E-Rate program. Each selected Achieve to be its service provider. However, in or around September 2008, USAC came to believe that Achieve had partnered with a private donor and offered the school districts reimbursement of the non-discount portion of the cost of service from the private donor. USAC informed the districts that Achieve had violated the rules by providing for rebates of the school's non-discount portion of the cost of service through a third-party, rescinded its funding commitment to the districts, and demanded that the districts return improperly disbursed funds.

Now pending is defendant USAC's motion to dismiss under Fed. R. Civ. P. 12(b)(6) for failure to exhaust administrative remedies and failure to state a claim. (Docket # 6.)

II. Legal Analysis

A complaint brought against a federal agency where the plaintiff has failed to exhaust the administrative remedies afforded by the agency is generally subject to dismissal.[1] When considering a motion to dismiss under Fed. R. Civ. P. 12(b)(6), the

[1] Plaintiff's motion to dismiss for failure to exhaust administrative remedies invokes Fed. R. Civ. P. 12(b)(6). There appears to be some confusion in the case law regarding whether motions to dismiss for failure to exhaust administrative remedies are more properly brought under Fed. R. Civ. P. 12(b)(1) rather than Fed. R. Civ. P. 12(b)(6). Compare United States v. Lahey Clinic Hospital, Inc., 399 F.3d 1, 8 (1st Cir. 2005) ("Failure to exhaust administrative remedies and ripeness challenges may be appropriate in a motion to dismiss for lack of subject matter jurisdiction [under Fed. R.

court must accept as true all well-pleaded facts and draw all reasonable inferences in favor of the plaintiff. See Dantone v. Bhaddi, 570 F. Supp. 2d 167, 170 (D. Mass. 2008).

A. Availability of Administrative Remedies

Here, USAC argues that suit in this court is not proper because Achieve did not exhaust its administrative remedies before bringing suit. Achieve responds that administrative exhaustion was not necessary in this case because it would be futile.

1. The USAC's Administrative Appeals Process

The regulations governing the E-Rate program provide for an administrative appeal process to address alleged errors by USAC. See 47 C.F.R. §§ 54.719-54.725. Those regulations provide:

> Any person aggrieved by an action taken by a division of the Administrator, as defined in § 54.701(g), a Committee of the Board of the Administrator, as defined in § 54.705, or the Board of Directors of the Administrator, as defined in § 54.703, may seek review from the Federal Communications Commission, as set forth in § 54.722.

47 C.F.R. § 54.719(c).

The regulations further provide that requests for review will be considered by the

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Civ. P. 12(b)(1)] (internal citations omitted), with Banks v. Ackerman Sec. Systems, Inc., No. 09-cv-0229-CC, 2009 WL 974242, *2 (N.D. Ga. 2009) ("[t]he Court dismisses these claims pursuant to Rule 12(b)(6) rather than Rule 12(b)(1) because exhaustion of administrative remedies is not a jurisdictional prerequisite.") However, because the pleading standards under Fed. R. Civ. P. 12(b)(1) and Fed. R. Civ. P. 12(b)(6) are substantially similar, this court need not decide the issue. See In re Parmalat Securities Litigation, 477 F. Supp. 2d 602, 607 (S.D.N.Y. 2007) ("As a general rule, a court deciding a Rule 12(b)(1) or 12(b)(6) motion accepts as true all well-pleaded factual allegations in the complaint and draws all reasonable inferences in the plaintiffs' favor.").

Wireline Competition Bureau of the FCC, unless the case involves novel issues of fact, law or policy, in which case the FCC will review the USAC's decision in the first instance. See 47 C.F.R. § 54.722.

2. The FCC's Administrative Appeals Process

In addition to the provisions for USAC review in 47 C.F.R. §§ 54.719-54.725, the FCC has a separate statute governing administrative review of its agency decisions. See 47 U.S.C. § 405(a). Moreover, FCC decisions are to be taken directly to the respective courts of appeal, entirely bypassing the district courts. See 47 U.S.C. § 402.

B. Applicability of the Exhaustion Requirement

USAC argues that exhaustion of the statutorily-created administrative process is mandatory, citing cases from two courts which have so held. See, e.g., Computer Consulting & Network Design, Inc. v. Universal Service Admin. Co., No. 08-cv-9 M, 2008 WL 2435932, at *6 (W.D. Ky. June 12, 2008) (dismissing claims brought against USAC where plaintiff failed to exhaust administrative remedies; court concluded: "[]to address [plaintiff's] claims in this case, it would be necessary to determine the propriety of actions taken by the USAC in the administration of the program. The agencies have the expertise to address these matters. The facts indicate that USAC and the FCC have a complete and adequate administrative review process in place"); and Integrity Comm., Ltd. v. Universal Service Admin. Co., No. B-08-29 (S.D.Tex. Sept. 22, 2008) (dismissing complaint brought against USAC for failure to exhaust administrative remedies).

Exhaustion is mandatory under the regulations. The basic purpose of the

exhaustion requirement is to allow the agency with expertise in administering its own programs "an opportunity to correct its own mistakes with respect to the programs it administers before it is haled into federal court." Woodford v. Ngo, 548 U.S. 81, 89 (2006) (citing McCarthy v. Madigan, 503 U.S. 140, 145 (1992)). Courts have also recognized that requiring exhaustion of administrative remedies "promotes efficiency, as administrative action typically proceeds more quickly than courtroom litigation" and may produce a useful record for later judicial review. Saulters v. Nicholson, 463 F. Supp.2d 123, 126 (D. Mass. 2006) (internal citations omitted).

Here, regardless of forum, the underlying issue is the correctness of USAC's actions in disqualifying the four participant school districts. Evaluation of those actions depends significantly on application of the statutes and regulations governing the agency, and the exhaustion requirement "allows the agency ... to apply its expertise to a problem." McKart v. United States, 395 U.S. 185, 194 (1968).

The mandatory exhaustion requirement is excused only where the process "would be futile or the remedy inadequate." Kieft v. Amer. Express. Co., 451 F. Supp. 2d 289, 294 (D. Mass. 2006). Achieve has filed an administrative appeal of the USAC's actions but contends the exhaustion requirement should be excused because completion of the process would be futile. See Complaint ¶¶ 23-24. Specifically, Achieve contends that appeal would be futile because: (1) the agency has "already predetermined the issue;" and (2) the administrative appeals process takes too long, which will irreparably harm Achieve. Id. at ¶¶ 24-26.

Plaintiff's arguments are unavailing. While it is true that the agency ruled

against Achieve in the first instance, that alone does not demonstrate that the agency has "predetermined" the issue and that exhaustion of administrative remedies would be futile.

III. Conclusion

For the reasons discussed above, defendant's motion to dismiss for failure to exhaust administrative remedies[2] (Docket # 6) is ALLOWED.

Judgment may be entered dismissing the complaint without prejudice.

October 29, 2009
DATE

/s/Rya W. Zobel
RYA W. ZOBEL
UNITED STATES DISTRICT JUDGE

[2] Because I conclude that plaintiff has failed to exhaust administrative remedies, I need not reach defendant's additional contention that the complaint should be dismissed under Fed. R. Civ. P. 12(b)(6) for failure to state a claim for either tortious interference with advantageous business relations or defamation.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ACHIEVE TELECOM NETWORK
Plaintiff

V.

UNIVERSAL SERVICE ADMINISTRATIVE
Defendants

CIVIL ACTION

NO. 09CV10315-RWZ

JUDGMENT

ZOBEL, D. J.

In accordance with the ORDER entered 10/20/09. Judgment is entered DISMISSING the complaint without prejudice.

By the Court,

10/29/09
Date

s/ Lisa A. Urso
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

INTEGRITY COMMUNICATIONS, LTD.,	§	
	§	
Plaintiff,	§	
	§	
v.	§	**CIVIL ACTION NO. B-08-29**
	§	
UNIVERSAL SERVICE ADMINISTRATIVE CO.,	§	
	§	
	§	
Defendant.	§	

OPINION & ORDER

BE IT REMEMBERED that on September 22, 2008, the Court **GRANTED** Defendant's Motion to Dismiss, Dkt. No. 4. The Court considered Defendant's Motion to Dismiss, Dkt. No. 4, Defendant's Memorandum of Points and Authorities in Support of Motion to Dismiss, Dkt. No. 5, Plaintiff's Response in Opposition to Defendant's Motion to Dismiss, Dkt. No. 9, Defendant's Reply to Plaintiff's Response to Motion to Dismiss, Dkt. No. 10, Defendant's Supplemental Authority to Defendant's Motion to Dismiss, Dkt. No. 19, and Plaintiff's Response to Supplemental Authority to Defendant's Motion to Dismiss, Dkt. No. 20. The Court did not consider Plaintiff's Opposition to Defendant's Motion to Dismiss, Dkt. No. 12.

The Court **GRANTED** Defendant's Motion to Strike Plaintiff's Opposition to Defendant's Motion to Dismiss, Dkt. No. 14. Defendant asserted that Plaintiff's Opposition to Defendant's Motion to Dismiss, Dkt. No. 12, did not comply with Local Rule 7.4A and Civil Procedure Rule 5.E. Dkt. No. 14, at 4. This Court agreed with Defendant. The Rules require that "[a]fter a motion, response, and reply are filed, the Court will not entertain any additional or supplemental filings unless they are accompanied by a motion for leave to file explaining why the additional filing is necessary in the interest of justice." LOCAL CIV. P. R. 5.E. Plaintiff did not accompany its filing with a motion for leave to file, nor did Plaintiff

respond to Defendant's Motion to Strike. Therefore, this Court **STRUCK** Plaintiff's Opposition to Defendant's Motion to Dismiss, Dkt. No. 12.

I. Background

Plaintiff Integrity Communications, Ltd. filed suit against Defendant Universal Service Administration Company, ("USAC"), in the 357th Judicial District of Cameron County, Texas on December 28, 2007. Dkt. No. 1, Ex. 1 at 3. Defendant removed the case on January 21, 2008. Dkt. No. 1. Defendant asserted that this Court had jurisdiction pursuant to 28 U.S.C. §§ 1332, 1441(a). *Id.* at 3. Defendant represented that it is a corporation organized under the laws of Delaware and maintains a principal place of business in Washington D.C., that Plaintiff is a Texas corporation, and that Plaintiff seeks an excess of $75,000 in damages. *Id.* Plaintiff did not move for remand.

Defendant is a nonprofit corporation established by the Federal Communications Commission, ("FCC"), for the sole purpose of administering the Universal Service Fund, ("USF"). 47 C.F.R. §§ 54.701-714. USF is a generated though mandatory contributions from telecommunications carriers that provide interstate telecommunications services. 27 U.S.C. § 254(d).

The FCC reasoned that the organizational structure of a non-profit would "provide for greater accountability and more efficient administration" in administering the E-Rate program. Ramsey L. Woodworth & Jared B. Weaver, *Camp Runamuck: The FCC's Troubled E-Rate Program*, 14 COMMLAW CONSPECTUS 335, 343 (2006) (citing *In re* Changes to the Bd. of Dir. of the Nat'l Exch. Carrier Ass'n, Inc. Fed.-State Joint Bd. on Universal Serv., *Report and Order and Second Order on Reconsideration*, 12 F.C.C.R. 18,400, ¶ 57 (July 17, 1997)). Defendant administers the School and Libraries Support Mechanism, also known as the E-Rate Program, through which Defendant distributes funds from USF, 47 C.F.R. § 54.504(b)(2), to "schools, school districts, and libraries to obtain certain eligible telecommunication services, Internet access, internal connections and basic maintenance of internal connections at discounted rates." Dkt. No. 5, at 3. "The Schools and Libraries Program, commonly known as E-rate, provides discounts to help schools and libraries in every U.S. state and territory receive affordable

telecommunications, Internet access, and internal connections." USAC, 2007 ANNUAL REPORT at 7, http://www.usac.org/_res/documents/about/pdf/usac-annual-report-2007.pdf.

School districts apply to Defendant for the E-Rate Program by completing FCC forms and then submitting the documents to Defendant by mail or through Defendant's website. *Id.* After Defendant approves a school district's initial application, the applicant school district must select the service provider through a selective bidding process and then submit FCC Form 470, an application listing details of the project. 47 C.F.R. § 54.504(a),(b). *See* USAC SCHOOLS AND LIBRARIES PROGRAM, APPLICATION PROCESS FLOW CHART, October 2006, http://www.usac.org/_res/documents/sl/pdf/application-process-flow-chart.pdf. Once the Form 470 is accepted, the applicant school district and the service provider sign a contract and the applicant school district seeking discounted services submits to Defendant FCC Form 471, which indicates the preferred payment method. 47 C.F.R. § 54.504(c). Defendant then reviews the total application and issues a funding commitment letter. *Id.* Defendant's Annual Report for 2007 states that from January 1, 1998 until December 31, 2007, Defendant has distributed through the School and Libraries Program approximately 14.3 billion dollars. USAC, 2007 ANNUAL REPORT at 50, http://www.usac.org/_res/documents/about/pdf/usac-annual-report-2007.pdf. Moreover, Texas has received approximately 1.5 billion dollars, accounting for a little less than eleven percent of Defendant's total disbursements. *Id.*

On January 10, 2002, Plaintiff entered into a contract with San Benito Consolidated School District, ("SBCISD"), for an integrated voice and data project. Dkt. No. 1, Ex. 1 at 6. SBCISD participated in the E-rate program and filed a Form 471 application with Defendant indicating that SBCISD selected Plaintiff as its Service Provider. *Id.* Defendant acknowledged the Form 471 application and mailed a Funding Commitment Decision Letter which granted funding for the project until the contract expired on June 30, 2003. *Id.* The project was delayed and work did not begin until December of 2003. *Id.* at 7. Plaintiff submitted invoices to SBCISD. *Id.* at 7-10. Plaintiff received payment from Defendant on February 8, 2007. *Id.* at 10. Thereafter, Defendant audited Plaintiff's project for SBCISD and determined Plaintiff was in non-compliance with the FCC's rules regarding payments of the non-discounted portion of the invoices and sought recovery of funds

disbursed to Plaintiff. *Id.* at 11. Defendant indicated that "Plaintiff failed to concurrently bill and collect for the portion of the work that SBCISD was obligated to pay." Dkt. No. 5, at 4.

Plaintiff's complaint alleged that Defendant is doing business in Texas. Dkt. No. 1, Ex. 1 at 3. Therefore, Plaintiff reasoned that Defendant could be served by sending the summons and complaint for Defendant to the Texas Secretary of State. *Id.* at 2. Plaintiff sought declaratory judgment that "Defendant USAC has no authority under the E-Rate rules and procedures to withhold payment of funds to Plaintiff" and that "USAC has no authority to withhold consideration of currently pending [funding request numbers, ("FRN's"),] on projects on which Plaintiff was the successful bidder where there is no determination that the award of the [Request for Competitive Sealed Proposals, ("RFP's")]/Contract to Plaintiff was not secured by competitive bidding." *Id.* at 15-16. Plaintiff asserted a failure to fund claim and requested $777,602.05 in liquidated damages and pre-judgment interest. *Id.* at 16-17. Plaintiff requested injunctive relief which would stop Defendant from

> (i) [a]ltering, destroying, or hiding any records . . . required to be maintained by USAC and/pr provided to Plaintiff under the E-Rate program . . . ;
> (ii) [p]lacing additional restrictions on, or otherwise withholding approval for funding not provided for in the E-Rate regulations, 47 CFR 54.500 *et. seq.* on any RFP/Contract and FRN's between Plaintiff and any beneficiary;
> (iii) [f]ailing to follow E-Rate procedures required by 47 CFR 54.500 *et. seq.*; and
> (iv) [p]lacing additional restrictions on the approval, funding, invoicing or payment other than those found in 47 CFR 54.500 and the instructions for filing form 474.

Id. at 17-18. In support of its request for injunctive relief, Plaintiff alleged that Defendant committed fraud, common-law conversion, and misappropriation of property. *Id.* at 19. Plaintiff further asserted fraud, tortious interference, and business disparagement claims and sought exemplary damages and attorneys fees. *Id.* at 20-23.

Defendant sought dismissal based on personal jurisdiction pursuant to Rule 12(b)(2), personal service pursuant to Rule 12(b)5), and failure to state a claim pursuant to Rule 12(b)(6). Dkt. No. 5. Defendant asserted that this Court had no jurisdiction

because all activities relevant to the case occurred "through channels of interstate commerce" and that Defendant did not conduct business in Texas. *Id.* at 4-5. Defendant reiterated the jurisdictional argument when reasoning that it had not been properly served. *Id.* at 6-7. Then Defendant stated that Plaintiff failed to state a claim upon which relief may be granted because it failed to exhaust the administrative remedies. *Id.* at 8-15. Defendant further asserted that Plaintiff had appealed to FCC by filing a "Request for Expedited Review" on December 26, 2007. Dkt. No. 5, Ex. 1.

Plaintiff responded that this Court had specific and general jurisdiction over Defendant as the basis of the claims arise from Defendant's contact with Texas residents and Defendant had demonstrated substantial, continuous, systematic contacts with Texas through the E-Rate program. Dkt. No. 9, at 7-16. Plaintiff reasoned that because this Court had personal jurisdiction over Defendant, Plaintiff properly mailed service to the Secretary of State of Texas and that "it was not necessary to serve a 'person in charge' of [Defendant's] business." *Id.* at 5-6. Plaintiff further asserted that as Defendant acted ultra vires, there are no exhaustion requirements and this Court need not refer this case to the FCC. *Id.* at17-18.

Defendant's Reply to Plaintiff's Response essentially challenged's Plaintiff Motion for Leave to file an Amended Complaint and reiterated its exhaustion argument. Dkt. No. 10.

II. Rule 12(b)(2), Personal Jurisdiction

"Where a defendant challenges personal jurisdiction, the party seeking to invoke the power of the court bears the burden of proving that jurisdiction exists." Luv n' care, Ltd. v. Insta-Mix, Inc., 438 F.3d 465, 469 (5th Cir. 2006) (citing Wyatt v. Kaplan, 686 F.2d 276, 280 (5th Cir. 1982)). The party seeking to invoke jurisdiction need only make a prima facie showing of personal jurisdiction over the defendant. *Id.* Moreover, the court must resolve all disputed facts in favor of jurisdiction. *Id.*; Cent. Freight Lines Inc. v. APA Transp. Corp., 322 F.3d 376, 380 (5th Cir. 2003).

Jurisdiction arises in three circumstances: (1) where the defendant has "continuous and systematic general business contacts" with the forum state the court may have general

jurisdiction, *id.* (quoting Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 415 (1984)); (2) where the suit arises out of or relates to defendant's contacts with the forum state the court may have specific jurisdiction, *id.*; and (3) where the defendant is served in the forum state the court may have jurisdiction. *Luv n' care, Ltd.*, 438 F.3d at 469. Essentially, where Defendant has sufficient minimum contacts with the forum state and jurisdiction would not offend "traditional notions of fair play and substantial justice" this Court may exercise jurisdiction. International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945); Moncrief Oil Intern. Inc. v. OAO Gazprom, 481 F.3d 309, 311 (5th Cir. 2007).

"A single act directed at the forum state can confer personal jurisdiction so long as that act gives rise to the claim asserted." *Moncreif Oil Intern. Inc.*, 481 F.3d at 311. Specific personal jurisdiction requires a three-step analysis:

> "(1) whether the defendant . . . purposefully directed [his] activities toward the forum state or purposefully availed [him]self of the privileges of conducting activities there; (2) whether the plaintiff's cause of action arises out of or results from the defendant's forum-related contacts; and (3) whether the exercise of personal jurisdiction is fair and reasonable."

Luv n' care, Ltd., 438 F.3d at 469 (quoting Nuovo Pignone v. Storman Asia M/V, 310 F.3d 374, 378 (5th Cir. 2002)). "For a nonresident defendant's forum contacts to support an exercise of specific jurisdiction, there must be a substantial connection between those contacts and the operative facts of the litigation." Moki Mac River Expeditions v. Drugg, 221 S.W.3d 569, 585 (Tex. 2007). Factors relevant to determining whether the exercise of personal jurisdiction would comport with fair play and substantial justice include: "(1) the burden on the nonresident defendant; (2) the forum state's interest in adjudicating the dispute; (3) the plaintiff's interest in obtaining convenient and effective relief; (4) the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and (5) the shared interest of the several states in furthering substantive social policies." Kelly v. General Interior Const., Inc., –S.W.2d –, 2008 WL 2605614, at *4 (Tex. App. 2008) (citing World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980)).

The Fifth Circuit has recognized that a website may establish specific jurisdiction in the forum state. Revell v. Lidov, 317 F.3d 467, 470-71 (5th Cir. 2002) (citing Zippo Manufacturing Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119 (W.D. Pa. 1997)). The *Zippo* sliding scale adopted by the Fifth Circuit measures an internet site's connections to a forum state, distinguishing a passive site that simply provides information which would not assert jurisdiction from interactive site which engages in "bilateral information exchange with its visitors" which may confer jurisdiction. *Id.* (citing *Zippo Manufacturing Co.*, 952 F. Supp. at 1124). Essentially, a court must evaluate the "extent of the interactivity and nature of the forum contacts" when determining whether the court has personal jurisdiction. *Id.* However, "engaging in commerce with residents of the forum state is not in and of itself the kind of activity that approximates physical presence within the state's borders." *Id.* at 471 (quoting Bancroft & Masters, Inc. v. Augusta Nat'l Inc., 223 F.3d 1082, 1086 (9th Cir. 2000)).

The Fifth Circuit has declined to extend the *Zippo* sliding scale in general jurisdiction analyses reasoning that it "is not well adapted to the general jurisdiction inquiry[] because even repeated contacts with forum residents by a foreign defendant may not constitute the requisite substantial, continuous and systematic contacts required for a finding of general jurisdiction." *Id.* However, some circuit courts have extended a modified sliding scale to general jurisdiction analyses. *See* Lakin v. Prudential Securities, Inc., 348 F.3d 704, 712 (8th Cir. 2003) (applying in the *Zippo* test and calculating the quantity of contacts with the forum state to determine general jurisdiction); Gator.Com Corp. v. L.L. Bean, Inc., 341 F.3d 1072, 1079 (9th Cir. 2003) (applying the *Zippo* sliding scale test in a general jurisdiction analysis by requiring that the internet company conduct business though the internet and that the internet business contacts with the forum state "be substantial or continuous and systematic," essentially requiring that the internet contacts be substantial enough to approximate physical presence); Gorman v. Ameritrade Holding Corp., 293 F.3d 506, 513 (D.C. Cir. 2002) (adopting the *Zippo* sliding scale in a general jurisdiction analysis and additionally evaluating the frequency and volume of the company's transactions with residents of the forum state).

The exercise of specific jurisdiction is appropriate and equitable in this matter.

Defendant argues that specific jurisdiction may only be asserted where the nonresident entered into a contract with a Texas resident which was to be performed in Texas or committed a tort in Texas. Dkt. No. 5, at 5 (citing TEX. CIV. PRAC. & REM. CODE § 17.042 (2008)). This Court disagrees. The Texas statute Defendant cites is non-exclusive. TEX. CIV. PRAC. & REM. CODE § 17.042 ("***In addition to other acts that may constitute doing business***, a nonresident does business in this state if the nonresident: (1) contracts by mail or otherwise with a Texas resident and either party is to perform the contract in whole or in part in this state; (2) commits a tort in whole or in part in this state; or (3) recruits Texas residents, directly or through an intermediary located in this state, for employment inside or outside this state.") (emphasis added).

In *Scholobohm v. Schapiro*, the Texas Supreme Court held that "doing business" did not necessarily require a contract or tort. 784 S.W.2d 355, 356-57 (1990). The Fifth Circuit explained that in *Scholobohm*, "the Texas Supreme Court support[ed] an expansive construction of 'doing business,'" as it "connect[ed] acts relevant to the long-arm statute with a 'business enterprise.'" Stroman Realty, Inc. v. Wercinski, 513 F.3d 476, 483 n.6 (5th Cir. 2008) (acknowledging Texas' expansive treatment of "doing business" but refusing to extend such treatment to a Commissioner's state regulation).

Without addressing the viability of the contract and tort claims, this Court finds that there exists personal jurisdiction over Defendant. Through its website, Defendant has conducted its business and purposefully directed its activities towards Texas. Bilateral information was exchanged through this website such that schools were able to apply for funding and Defendant granted funding and made payments to schools or service providers in the state of Texas totaling approximately 1.5 billion dollars. *See* USAC, 2007 ANNUAL REPORT at 7, http://www.usac.org/_res/documents/about/pdf/usac-annual-report-2007.pdf.

Moreover, this matter arises from Defendant's contact with SBCISD and Plaintiff in Texas. In this case, SBCISD applied for funding, Plaintiff was selected as the service provider, and Defendant granted funding to the project and eventually issued funds to Plaintiff. Dkt. No. 1, Ex. 1. This suit arises from the subsequent audit and Defendant's

action to recover the funds it dispersed to Plaintiff. *Id.* at 11. Therefore, this Court finds that there is a substantial connection between Defendant's activities and the operative facts in this suit. As Defendant maintained an interactive website designed to providing financial assistance to schools and libraries across the country and was an involved and controlling contributor to a contract between SBCISD and Plaintiff, this Court further finds that it is fair and reasonable to exercise jurisdiction over this matter. Defendant intended its program to assist schools and libraries across the country and in the process Defendant contributed a substantial amount of money to schools and libraries within Texas. Therefore, the exercise of personal jurisdiction comports with fair play and substantial justice.

Alternatively, Defendant's contacts with the state of Texas are continuous and systematic such that this Court may exercise general jurisdiction. *See Gorman*, 293 F.3d at 513. Approximately eleven percent of Defendant's School and Library disbursements over the last ten years were to schools and libraries in the state of Texas. USAC, 2007 ANNUAL REPORT at 7, http://www.usac.org/_res/documents/about/pdf/usac-annual-report-2007.pdf. Texas schools and libraries have received approximately 1.5 billion dollars from Defendant. *Id.* Moreover, schools, libraries, and their service providers must submit documentation before, during, and after the projects to receive the disbursements. USAC SCHOOLS AND LIBRARIES PROGRAM, APPLICATION PROCESS FLOW CHART, October 2006, http://www.usac.org/_res/documents/sl/pdf/application-process-flow-chart.pdf. Such involvement extensive in contracts taking place in Texas and substantial contributions to schools and libraries in Texas constitute activity by Defendant that is continuous and systematic. Therefore, the exercise of general jurisdiction is also appropriate. Defendant's motion for dismissal based on Rule 12(b)(2) is **DENIED**.

III. Rule 12(b)(5), Service

Defendant withdrew this portion of its Motion to Dismiss as service has been perfected. Dkt. No. 10, at 1-2 n.1. Therefore, this Court will not address the issue of service.

IV. Rule 12(b)(6), Failure to State a Claim

A motion to dismiss for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6) is "viewed with disfavor and is rarely granted." Kennedy v. Tangipahoa Parish Library Bd. of Control, 224 F.3d 359, 365 (5th Cir. 2000); Lowrey v. Texas A & M University System, 117 F.3d 242, 247(5th Cir. 1997) (quoting Kaiser Aluminum & Chemical Sales, Inc. v. Avondale Shipyards, 677 F.2d 1045, 1050 (5th Cir. 1982)). Fifth Circuit law dictates that a district court must accept all well-pleaded facts as true and view them in the light most favorable to the plaintiff. *See* Baker v. Putnal, 75 F.3d 190, 196 (5th Cir. 1996); Collins v. Morgan Stanley Dean Witter, 224 F.3d 496, 498 (5th Cir. 2000).

A complaint will not be dismissed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957). *See also* Baton Rouge Bldg. & Constr. Trades Council AFL-CIO v. Jacobs Constructors, Inc., 804 F.2d 879, 881 (5th Cir. 1986). "[T]he Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Conley*, 355 U.S. at 47. The Fifth Circuit has held, however, that dismissal is appropriate "if the complaint lacks an allegation regarding a required element necessary to obtain relief." Blackburn v. City of Marshall, 42 F.3d 925, 931 (5th Cir. 1995) (citation omitted). Essentially, "the complaint must contain either direct allegations on every material point necessary to sustain a recovery . . . or contain allegations from which an inference fairly may be drawn that evidence on these material points will be introduced at trial." Campbell v. City of San Antonio, 43 F.3d 973, 975 (5th Cir.1995).

Defendant stated that dismissal pursuant to Rule 12(b)(6) is proper as Plaintiff failed to exhaust its administrative remedies. Dkt. No. 5, at 8. Defendant asserted that the FCC has regulations providing for administrative appeal and that Plaintiff has filed an appeal. *Id.* Defendant argued that resolution of that appeal is a condition precedent to this Court's review. *Id.* Plaintiff responded that primary jurisdiction applied but did not bar substantive review of this case as the administrative agency's corporation exercised authority beyond

its conferred powers. Dkt. No. 9, at 15. Plaintiff further stated that it was not required to exhaust any administrative remedy before bringing this action. *Id.* at 16.

The judicial doctrine of exhaustion, which applies in this case as Congress has not legislated exhaustion requirements, "generally refers to administrative and judicial procedures by which an injured party may seek review of an adverse decision and obtain a remedy if the decision is found to be unlawful or otherwise inappropriate." Darby v. Cisneros, 509 U.S. 137, 144 (1993) (quoting Williamson co. Regional Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 193 (1985)). A court's judicial discretion depends on congressional intent. *Id.* "The basic purpose of the exhaustion doctrine is to allow an administrative agency to perform functions within its special competence – to make a factual record, to apply its expertise, and to correct its own errors so as to moot judicial controversies." Parisi v. Davidson, 405 U.S. 34, 37 (1972). "[I]t serves the twin purposes of protecting administrative agency authority and promoting judicial efficiency." McCarthy v. Madigan, 503 U.S. 140, 144 (1992).

Both Plaintiff and Defendant agreed that there is an appellate procedure available to those challenging decisions by Defendant and both conceded that the language is permissive. "Any person aggrieved by an action. . . ***may"*** seek administrative review. 47 C.F.R. § 54.719(c); 47 U.S.C. § 155(c)(4) (emphasis added). Plaintiff asserted that the permissive language indicates that exhaustion is not required, Dkt. No. 9, at 16-17, while Defendant stated that "may" means "must" and that exhaustion of administrative remedies is required. Dkt. No. 5, at 9-10.

This is a matter of first impression within the Fifth Circuit. However, two other district courts in other Circuits have addressed suits against Defendant. A district court in the District of Kansas invoked primary jurisdiction and stayed the federal case while the matter was referred to the FCC for clarification. Twin Valley Telephone, Inc. v. Universal Service Admin. Co., 2007 WL 3010352, at *3 (D. Kan. 2007). In the Western District of Kentucky, a district court held that the federal regulations created mandatory exhaustion requirements for suits against Defendant. Computer Consulting & Network Design, Inc. v. Universal Service Admin. Co., 2008 WL 2435932, at *6 (W.D. Ky. 2008) ("After considering the nature of the regulatory scheme, the purposes to be served by the exhaustion doctrine,

and in the exercise of judicial discretion, the Court concludes that [the plaintiff] should have exhausted its administrative remedies prior to seeking relief here.").

This Court follows the reasoning of the district court in the Western District of Kentucky and evaluates the application of the judicial doctrine of exhaustion. The federal regulations and statutes relevant to this matter provide for initial administrative review, administrative reconsideration, and then appellate review by the United States Court of Appeals for the District of Columbia. 47 C.F.R. § 54.719; 47 U.S.C. §§ 155(c)(4), 402(b), 405(a). In fact, section 155(c)(7) states that "[t]he filing of an application for review under this subsection shall be a condition precedent to judicial review." Moreover, "where Congress establishes a special statutory review procedure for administrative action, that procedure is generally the exclusive means of review for those actions." Greater Detroit Res. Recovery Auth. v. U.S. Envtl. Prot. Agency, 916 F.2d 317, 321 (6th Cir. 1990).

Plaintiff argues that as Defendant was acting ultra vires deference to the FCC is inappropriate and the exhaustion doctrine should not apply. Dkt. No. 9, at 17. While Plaintiff alleges various state claims, the basis for the suit are alleged violations of the rules and procedures established by the FCC for Defendant to follow. Dkt. No. 1, Ex. 1 at 17-18. This Court is not persuaded that the claims present solely a matter of law which may be resolved by this Court. The FCC is in the best position to assess Defendant's actions and the FCC should be provided the opportunity to first interpret its rules and regulations for Defendant. This Court holds that Plaintiff has failed to exhaust its administrative remedies and therefore this case must be dismissed. Defendant's motion to dismiss pursuant to Rule 12(b)(6) is **GRANTED**.

V. Conclusion

For the aforementioned reasons, the Court **DISMISSES** this case as Plaintiff failed to exhaust its administrative remedies. The District Clerk is **ORDERED** to close this case.

DONE at Brownsville, Texas, on September 22, 2008.

Hilda G. Tagle
United States District Judge

FILED
2006 Sep-29 PM 01:31
U.S. DISTRICT COURT
N.D. OF ALABAMA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

MARTHA SELF, Plaintiff, v. BELLSOUTH MOBILITY, INC., a corporation, Defendant and Third-Party Plaintiff, v. FEDERAL COMMUNICATIONS COMMISSION and UNIVERSAL SERVICE ADMINISTRATIVE COMPANY, Third-Party Defendants.	)	2:98-cv-02581-JEO

MEMORANDUM OPINION

Before the court are the motions of third-party defendants Federal Communications Commission ("FCC") (doc. 122) and Universal Services Administrative Company ("USAC") (doc. 120) to dismiss the third-party complaint of defendant/third-party plaintiff Cingular Wireless, LLC, for itself and as successor in interest to BellSouth Mobility, LLC, BellSouth Mobility, Inc., and American Cellular Communications Corporation (collectively "Cingular" and "third-party plaintiff") (doc. 125). The motions are opposed by Cingular.[1] (Doc. 126). Upon consideration, the court finds that the motions to dismiss are due to be granted without prejudice.

[1]In its opposition, Cingular references its amended third-party complaint (doc. 125), which it filed on the same day as its opposition. In their replies, both the FCC and USAC address Cingular's amendment so the court has treated their motions to dismiss as motions to dismiss the amended complaint.

BACKGROUND

In the underlying litigation, the plaintiff (for herself and as a putative class representative) alleges that Cingular improperly recovered its contributions to the Universal Service Fund ("USF") from its customers in violation of the Federal Communications Act ("FCA"). Cingular answered the complaint, asserting, among other things, that its actions in collecting the fee were permitted by FCC regulations and were necessary to recover Cingular's USF contributions.

Under the Telecommunications Act of 1996, providers of "commercial mobile radio service" ("CMRS"), such as Cingular, were required to contribute to a program to offset the cost of providing cellular service to rural customers. The amount due from each CMRS provider in order to promote universal service was determined by the FCC and collected on a monthly basis from the CMRS carriers by the USAC, which was designated by the FCC as the "administrator" of the program. *See* 47 C.F.R. Part 54. Under this newly expanded program, the FCC set up two different funds to achieve its goal of universal service. Each was funded differently. The first fund was intended to subsidize the expensive and unprofitable rural customers and drew its funding from interstate and international revenues of the CMRS providers. *Id.* The second fund was intended to support schools, libraries, and health care facilities and drew its funding from intrastate as well as interstate and international revenues of the CMRS providers. *Id.*

In a December 30, 1997 order, the FCC stated, among other things, that CMRS carriers were permitted to recover the universal service charges that they were required to pay to the FCC from both their interstate and intrastate customers. *See* Fourth Order on Reconsideration in Docket No. 96-45, Report and Order in CC Docket Nos. 96-45, 96-262, 94-1, 91-213, 95-72, ¶

309 ("Fourth Reconsideration Order"). The order stated that CMRS carriers were *permitted*, but not required, to recover the universal service charges from their customers. *Id.* Premised on this order, the defendant, as well as other CMRS providers, recovered their universal service fees from both its interstate and intrastate customers.

On July 30, 1999, the Fifth Circuit Court of Appeals decided *Texas Office of Public Utility Counsel v. Federal Communications Commission,* 183 F.3d 393 (5th Cir. 1999)("*Texas Office*"). Therein the court held, in part, that the FCC had "exceeded its jurisdictional authority when it assessed contributions for § 254(h) 'schools and libraries' programs based on the combined intrastate and interstate revenues of interstate telecommunications providers and when it asserted its jurisdictional authority to do the same on behalf of high-cost support." *Texas Office*, 183 F.3d at 409. The court's mandate was made effective November 1, 1999.

The FCC responded to the *Texas Office* decision by issuing an order prospectively eliminating universal fees based on intrastate revenues effective November 1, 1999. The FCC order merely stated that the FCC would not base the amount of universal service fees collected by the FCC from the CMRS carriers on the combined interstate and intrastate revenues of the CMRS carrier. The order did not address whether this newly defined (and lower) sum that the CMRS carriers were to pay to the FCC could be recovered by the CMRS carriers from both their interstate and intrastate customers, or whether it could only be recovered by the CMRS carriers from their interstate customers.

BellSouth Corporation, the parent company of BellSouth Mobility (predecessor of Cingular) filed a petition with the FCC on December 6, 1999, seeking reconsideration and clarification of certain matters raised by the decision in *Texas Office*. (Doc. 53, Ex. C).

Specifically, direction was sought from the FCC concerning whether it may retain the universal fees recovered from its customers on intrastate revenues prior to the *Texas Counsel* decision and whether it may continue to recover the allowable costs of the universal fees through charges on their intrastate and interstate subscriber-customers. Upon motion by the defendant, this action was stayed pending FCC ruling on BellSouth's petition.

On August 22, 2005, the FCC released its ruling on BellSouth's petition. *Order on Petition for Reconsideration and Clarification of the Fifth Circuit Remand Order of BellSouth Corporation*, CC Docket 96-45, 96-262, 2005 WL 2007108 (F.C.C.). The FCC held that CMRS providers may recover their universal service contributions through rates charged for all of their services and that the FCC's decision in the Fifth Circuit Remand Order applied the Fifth Circuit decision prospectively beginning November 1, 1999. *Id.* at 1. The Commission declined to address BellSouth's request for reconsideration of the Commission's decision so as to implement the Fifth Circuit's decision on a prospective basis or BellSouth's request for refund of its universal service fund contributions based on intrastate revenues, instead choosing to address the matter in a subsequent order. *Id.* at n.16.

Shortly after the issuance of the Commission's ruling and the subsequent lifting of this Court's Order to Stay Proceedings in this case, Cingular filed its third-party complaint against USAC and the FCC in this matter. (Doc. 105). After USAC and the FCC responded with their motions to dismiss (doc. 120 & 122), Cingular filed an amended third-party complaint along with a memorandum opposing the motions to dismiss (doc. 125 & 126). USAC and the FCC both subsequently filed reply briefs. (Doc. 129 & 130).

In Cingular's third-party complaint, it alleges that "Cingular has acted in accordance with

the FCC's and USAC's rules and regulations in making contributions to the USF and in recovering its USF contributions from customers." (Doc. 105 at ¶ 10). Cingular further asserts that the FCC and/or USAC will be liable to it for some or all of any judgment that the plaintiff might recover from it. (Doc. 105 at ¶¶ 15, 25). In the amended third-party complaint, Cingular also asserts that:

> The Plaintiff has made averments of the Federal Communications Act and the 1996 Act that if established would also establish that Cingular's USF contributions were wrongfully exacted by USAC or the FCC or both. Accordingly, Cingular would be entitled to restitution from USAC or the FCC or both of the amounts wrongfully exacted.

(Doc. 125 at ¶ 17).

> The Plaintiff has made averments with respect to the response of USAC and the FCC to the *Texas Office* decision that if established would also establish that Cingular's USF contributions were wrongfully exacted by USAC or the FCC or both. Accordingly, Cingular would be entitled to restitution from USAC or the FCC or both of the amounts wrongfully exacted.

(Doc. 125 at ¶ 28).

MOTION TO DISMISS STANDARD

Because the defendants challenge the court's jurisdiction to hear the third-party claims (FED. R. CIV. P. 12(b)(1)), the standard of review is as follows:

> Attacks on subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1) come in two forms. "Facial attacks" on the complaint "require[ ] the court merely to look and see if [the] plaintiff has sufficiently alleged a basis of subject matter jurisdiction, and the allegations in his complaint are taken as true for the purposes of the motion." *Menchaca v. Chrysler Credit Corp.*, 613 F.2d 507, 511 (5th Cir.), *cert. denied*, 449 U.S. 953, 101 S. Ct. 358, 66 L. Ed. 2d 217 (1980) (citing *Mortensen v. First Fed. Sav. & Loan Ass'n*, 549 F.2d 884, 891 (3d Cir. 1977)). "Factual attacks," on the other hand, challenge "the existence of subject matter jurisdiction in fact, irrespective of the pleadings, and matters outside the pleadings,

such as testimony and affidavits, are considered." *Id.*

> These two forms of attack differ substantially. On a facial attack, a plaintiff is afforded safeguards similar to those provided in opposing a Rule 12(b)(6) motion - the court must consider the allegations of the complaint to be true. *Williamson v. Tucker*, 645 F.2d 404, 412 (5th Cir.), *cert. denied*, 454 U.S. 897, 102 S. Ct. 396, 70 L. Ed. 2d 212 (1981). But when the attack is factual, the trial court may proceed as it never could under 12(b)(6) or Fed. R. Civ. P. 56. Because at issue in a factual 12(b)(1) motion is the trial court's jurisdiction - its very power to hear the case - there is substantial authority that the trial court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case. In short, no presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims. *Id.* at 412-13 (quoting *Mortensen*, 549 F.2d at 891).

Lawrence v. Dunbar, 919 F.2d 1525, 1528-29 (11th Cir. 1990) (emphasis added). Explained another way,

> a Rule 12(b)(1) motion can serve either purpose. If it simply challenges the sufficiency of the allegations of subject matter jurisdiction, then the pleading's contents are taken as true for purposes of the motion. However, if it challenges the actual existence of subject matter jurisdiction, then the pleading's allegations are merely evidence on the issue. Since the party invoking the federal court's jurisdiction has the burden of proving the actual existence of subject matter jurisdiction regardless of the pleading's allegations, the courts have held that the pleader must establish jurisdiction with evidence from other sources, such as affidavits or depositions. The general rule, therefore, is that a pleading's allegations of jurisdiction are taken as true unless denied or controverted by the movant. Thus, if the movant fails to contradict the pleader's allegation of subject matter jurisdiction in his motion to dismiss under Rule 12(b)(1), then he is presumed to be challenging the pleading's sufficiency under Rule 8(a)(1), and the allegations of the pleading pertaining to jurisdiction are taken as true. But if the movant, either in his motion or in any supporting materials, denies or controverts the pleader's allegations of jurisdiction, then he is deemed to be challenging the actual existence of subject matter jurisdiction, and the allegations of the

> complaint are not controlling.
>
> The court will not accept as true allegations that are contradicted by facts that can be judicially noticed or by other allegations or exhibits attached to or incorporated in the pleading. On the other hand, the allegations of the pleading will be supplemented by any relevant matter that can be judicially noticed or by the contents of any exhibits attached to the pleading or any matter validly incorporated by reference.
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> 5A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1363 (2d e.1990).

Anderson v. United States, 245 F. Supp. 2d 1217, 1220-21 (M.D. Fla. 2002).

In reviewing a motion to dismiss premised on a failure to state a claim (FED. R. CIV. P. 12(b)(6)), the court "must accept the allegations set forth in the complaint as true. *See United States v. Pemco Aeroplex, Inc.*, 195 F.3d 1234, 1236 (11th Cir. 1999) (en banc)." *Lotierzo v. Woman's World Medical Center, Inc.*, 278 F.3d 1180, 1182 (11th Cir. 2002). Similarly, it must construe all the factual allegations in the light most favorable to the plaintiff. *Sofarelli v. Pinellas County*, 931 F.2d 718, 721 (11th Cir. 1991) (citing *Scheuer v. Rhodes*, 416 U.S. 232, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1947)). Such a motion may be granted only "when the movant demonstrates 'beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 102, 2 L. Ed. 2d 80 (1957)." *Harper v. Blockbuster Entertainment Corp.*, 139 F.3d 1385, 1387 (11th Cir.), *cert. denied*, 525 U.S. 1000, 119 S. Ct. 509, 142 L. Ed. 2d 422 (1998).

DISCUSSION[2]

Subject Matter Jurisdiction

In their motions to dismiss, both the FCC and USAC assert that this court lacks subject matter jurisdiction over Cingular's claims. The court will address both motions below.

The FCC and Jurisdiction of the Courts of Appeals

Prior to the amendment of the third-party complaint, the FCC argued that it had not waived sovereign immunity with respect to the damages sought in the third-party complaint. (Doc. 123 at 7-12). "Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit." *JBP Acquisitions, LP v. United States ex rel. FDIC*, 224 F.3d 1260, 1263 (11th Cir. 2000) (quoting *FDIC v. Meyer*, 510 U.S. 471, 475, 114 S. Ct. 996, 127 L. Ed. 2d 308 (1994). A waiver of sovereign immunity "must be unequivocally expressed in statutory text," and "will be strictly construed . . . in favor of the sovereign." *United States v. Aisenberg*, 358 F.3d 1327, 1342 (11th Cir. 2004), *cert. denied*, 543 U.S. 868, 125 S. Ct. 276, 160 L. Ed. 2d 115 (2004) (quoting *Lane v. Pena*, 518 U.S. 187, 192, 116 S. Ct. 2092, 2096, 135 L. Ed. 2d 486 (1996)). Specifically, "a plaintiff must have a substantive right to the relief sought and an explicit Congressional consent authorizing such relief in order to maintain an action against the United States." *Swank, Inc. v. Carnes*, 856 F.2d 1481, 1483 (11th Cir. 1998) (quoting *Keesee v. Orr*, 816 F.2d 545, 547 (10th Cir. 1987)). Thus, a plaintiff may not rely on the general federal jurisdiction embodied to establish district court jurisdiction, but must instead identify a specific

[2]As stated previously, when Cingular responded to the USAC's and the FCC's motions to dismiss, it also filed an amended third-party complaint. Therefore, some of the points made in the original motions to dismiss became moot with the amended third-party complaint. For resolution of the motions to dismiss, the court deems the memorandums in support of the motions to dismiss moot (except to the extent that an argument may have been dealt with more extensively in the original motion and referenced by the replies) and relies upon Cingular's response and the FCC's and USAC's replies to that response. The court will not address issues in the original memorandums that were made superfluous by the amended third-party complaint.

statutory provision waiving the government's immunity from suit. *Garcia v. United States*, 666 F.2d 960, 966 (5th Cir.), *cert. denied*, 459 U.S. 832, 103 S. Ct. 73, 74 L. Ed. 2d 72 (1982).

Cingular asserts that its claim for restitution may be brought pursuant to 28 U.S.C. § 1346(a) (the "Tucker Act"), which provides that:

> (a) The district courts shall have original jurisdiction . . . of:
>
> . . .
>
> (2) Any other civil action or claim against the United States, not exceeding $10,000 in amount,[3] founded either upon the Constitution, or any act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort . . . .

28 U.S.C. § 1346(a)(2). Among those claims that may be brought pursuant to § 1346(a)(2) are "those in which the plaintiff has paid money over to the Government, directly or in effect, and seeks return of all or part of that sum." *Aerolineas Argentinas v. United States*, 77 F.3d 1564, 1572-73 (Fed. Cir. 1996) (quoting *Eastport S.S. Corp. v. United States*, 178 Ct. Cl. 599, 605, 372 F.2d 1002, 1007 (1967)).

The FCC retorts, however, that a Tucker Act claim for restitution of monies paid to the Government must be based on a finding that the Government acted "illegally" in requiring the payment. *See Aerolineas Argentinas*, 77 F.3d at 1573 (under the Tucker Act, the court "determine[s] whether the charges were illegally exacted by the government"). (Doc. 130 at p. 4). Cingular asserts in the third-party complaint that Self, the original plaintiff in this action, has presented allegations "that if established would also establish that Cingular's USF contributions

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[3]Cingular asserts that the claims are within the jurisdictional amount because under the Tucker Act, claims of individuals in a class action are not aggregated for purposes of district court jurisdiction. *See March v. United States*, 506 F.2d 1306, 1309 n.1 (D.C. Cir. 1974).

were wrongfully exacted by USAC or the FCC or both." (Doc. 125 at ¶¶ 17 & 26). Further, Cingular asserts that it would therefore be entitled to restitution from the USAC or the FCC or both for any funds wrongfully exacted. *Id.*

The FCC argues, however, that Cingular's claims, as amended, are exclusively within the jurisdiction of the courts of appeals. (Doc. 130 at 4-8). This court agrees. Cingular's complaint challenges the FCC's USF regulations and that challenge is within the exclusive jurisdiction of the courts of appeals. The relevant portion of the Communications Act provides as follows:

> Any proceeding to enjoin, set aside, annul, or suspend any order of the Commission under this chapter (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in chapter 158 of Title 28.

47 U.S.C. § 402(a). Additionally, the Hobbs Act provides:

> The court of appeals (other than the United States Court of Appeals for the Federal Circuit) has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of - -
>
> (1) all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47.

28 U.S.C. § 2342(1).

While Cingular attempts to circumvent the issue of the propriety of the FCC's order in an effort to establish its third-party claims, it simply has not set forth any way that the FCC would be liable to Cingular for its collection of fees from its customers that is not related to the FCC's order. Cingular asserts as follows:

> Ms. Self's complaint on its face does not challenge any final orders of the FCC. The Third-Party Complaint, being derivative of Ms. Self's claims, does not challenge a final order of the FCC. To the contrary, in order to establish its claim for restitution against USAC, Cingular must establish that it complied with FCC orders in assessing Ms. Self and paying over contributions to USAC.

(Doc. 126 at 7). At this stage in the litigation, the court cannot foresee a claim that Self could establish against Cingular for which the FCC and/or USAC would be liable to Cingular, that does not involve an FCC order.[4] It remains to be seen whether Self can establish a claim against Cingular independent of the FCC's order. However, if she does, the court cannot see how the FCC would be liable to Cingular for a claim that does not involve it.

Moreover, should Self establish a claim against Cingular for which Cingular is owed restitution from the FCC and/or USAC, the proper procedure is for Cingular to file a refund application with USAC. *See* 47 C.F.R. § 54.719(b). If Cingular is not satisfied with the response from USAC, then Cingular may apply for review by the FCC. *See* 47 C.F.R. § 54.719(c). Ultimately, any final decision by the FCC denying the requested relief would be reviewable in the courts of appeals under the sections cited above. However, the administrative procedures are a prerequisite to judicial review of any FCC regulatory action. *See, e.g., Int'l Telecard Ass'n v. FCC*, 166 F.3d 387 (D.C. Cir. 1999) (dismissing appeal as premature because the Commission had not yet ruled on the pending application for review); *Tipperary v. United States*, 11 Cl. Ct. 572, 577 (Cl. Ct. 1987) (finding "no excuse for plaintiffs' failure to pursue the administrative remedy that was available" (under the Economic Stabilization Act and the Emergency Petroleum Allocation Act) and finding that failure precluded judicial review). Where Congress provides "a specific and comprehensive scheme for administrative and judicial review . . . Tucker Act jurisdiction over the subject matter covered by the scheme is preempted." *Folden v. United States*, 379 F.3d 1344 (Fed. Cir. 2004). As this court has stated previously, "[a]lthough the

[4]In fact, Cingular asserts in its response that "ultimately Ms. Self must challenge FCC orders in order to advance her claims because Cingular can point to an order as a defense to every action that Ms. Self challenges." (Doc. 126 at 7). However, it further asserts "that is a separate issue from whether or not Cingular can maintain a claim against the Third-Party defendants." *Id.*

plaintiff brings state claims against the defendant, resolution of those matters will necessarily involve a determination of the validity of certain orders and actions of the FCC." (Doc. 74 at 7). For the foregoing reasons, Cingular's amended third-party complaint is due to be dismissed as to the FCC.[5]

The USAC

Tucker Act Jurisdiction

USAC first argues that 28 U.S.C. § 1346(a)(2) does not provide this court with jurisdiction because it only grants it jurisdiction over non-tort monetary claims not exceeding $10,000 against the United States and because USAC is a private corporation. (Doc. 129 at 5-6). Cingular does not disagree that USAC is a private corporation, but contends that USAC is amenable to suit because it holds USF funds and "is vested with the power to recover . . . unpaid universal service assessments." (Doc. 126 at pp. 10-11 (quoting *In re Incomnet, Inc.*, 299 B.R. 574, 576 (BAP 9th Cir. 2003))). The court, however, finds the *In re Incomnet* case to be factually and legally dissimilar from the instant case such that it provides no assistance in

[5]The FCC also argues that "'conclusory allegations, unwarranted factual deductions or legal conclusions masquerading as facts will not prevent dismissal,'" (doc. 123 at p. 8 (citing *Davila v. Delta Air Lines, Inc.*, 326 F.3d 1183, 1185 (11th Cir. 2003), *cert. denied*, 540 U.S. 1016 (2003))), and Cingular's third-party complaint fails to meet these standards. Cingular attempts to plead with particularity that its claims against the FCC and USAC are for "restitution for a wrongful exaction and alternatively against USAC, as a private party, for restitution." (Doc. 126 at p. 4). In so doing, Cingular argues that because the plaintiff is seeking restitution from it for monies wrongfully collected, it is seeking restitution of the government exaction wrongfully paid. *Id.* at p. 5. The problem with this argument is that the court has yet to determine whether it has jurisdiction over the plaintiff's claims challenging the USF program, and, if it does, whether the plaintiff has sufficiently stated a claim against Cingular. Although the plaintiff's claims are couched in terms of breach of contract, negligence, violation of the Federal Communications Act, unjust enrichment/money had and received/conversion, misrepresentation and suppression, and conspiracy, all of her claims necessarily revolve around the legality of the FCC's rules and regulations. In fact, in Cingular's amended third-party complaint, it states that:

> Cingular has denied the material averments of Self's Amended Complaint and has raised a number of affirmative defenses to her claims for relief. In particular, Cingular has answered that its assessment and recovery of contributions to the USF were in accordance with FCC and USAC rules and regulations and were necessary to recover Cingular's mandatory contributions to USAC for the USF.

(Doc. 125 at ¶ 16). Cingular's defense of Self's claims consistently comes back to the FCC's rules and regulations. The propriety of those rules and regulations must be adjudged in the appropriate forum, which is not this district court.

determining whether USAC is amenable to suit under the Tucker Act.[6] Because the court finds that it lacks subject matter jurisdiction over Cingular's claim against USAC for alternative reasons, it declines to delve further into this issue at this juncture.

Federal Question Subject Matter Jurisdiction

USAC next argues that the court lacks federal question subject matter jurisdiction over Cingular's third-party complaint. USAC asserts that there are three problems with Cingular's argument that Self could establish a federal claim against Cingular for which USAC would be liable to Cingular "independent of FCC rules and regulations." (Doc. 129 at 6-12).

First, USAC argues that Cingular's prior arguments to this court and its third-party complaint assert that Self's claims facially challenge the legality of FCC orders. Specifically, USAC points out that in its brief seeking a stay of this action, Cingular represented the following to the court:

> In essence, the plaintiff asks the court to rewrite the FCC's cellular recovery rules based on *Texas Office*. . . . [T]he plaintiff is asking the court to "enjoin, set aside, suspend . . . or determine the validity of [a] final order of the [FCC]," which is a matter within the exclusive jurisdiction of the courts of appeals. *See* 28 U.S.C. § 2342; *see also* 47 U.S.C. § 402. Unless and until stayed or overturned by a court of competent jurisdiction (*i.e.*, a court of appeals), FCC orders have the force and effect of law and are binding upon the parties and the courts. An alternative court may not grant relief that would have the practical effect of suspending or setting aside a federal agency order.

(Doc. 129 at 7-8 (quoting Doc. 63 at 2)); and that Self "could only recover on her federal claims if the FCC's rules were overturned." (Doc. 129 at 8 (quoting Doc. 52 at 3)). Additionally, USAC argues that Self's amended third-party complaint furthers this argument through the

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[6]The *Incomnet* case is a bankruptcy case in which the court had to discern whether USAC was a "conduit" or "transferee" for purposes of determining its treatment under a transfer order.

wrongful exaction claims. Specifically, USAC points out that Cingular argues the following:

> [T]here is no question that Cingular will claim that it followed the FCC's rules and regulations in recovering its USF contributions from its customers and that Ms. Self cannot prevail because she is challenging those rules, which can only be challenged in the federal courts of appeals and on a timely basis.

(Doc. 129 at 8 (quoting Doc. 126 at 3)).

Second, USAC argues that the court has already held that resolution of Self's claims requires a determination of the legality of a FCC order. (Doc. 129 at 9-10). Finally, USAC argues that Cingular is judicially estopped from denying that its pleading invokes a challenge to the FCC's orders. (Doc. 129 at 10-12). In support of this argument, USAC asserts that "[j]udicial estoppel is intended to protect the integrity of the judicial system. This doctrine . . . precludes a party from assuming a position in a legal proceeding inconsistent with one previously asserted when inconsistency would allow the party to play fast and loose with the courts." (Doc. 129 at 10 (quoting *Chandler v. Samford Univ.*, 35 F. Supp. 2d 861, 863 (N.D. Ala. 1999))). Judicial estoppel prevents a party "from deliberately changing positions according to the exigencies of the moment." *Barger v. City of Cartersville*, 348 F.3d 1289, 1293 (11th Cir. 2003) (internal quotation marks and citations omitted). The position that Cingular now takes is that

> Ms. Self may establish a federal claim independent of those [FCC] rules for return of her USF assessments . . . USAC's and the FCC's challenge to the Court's jurisdiction are based only on an assumption that Ms. Self cannot establish a federal claim that is independent of an FCC order. It remains to be seen whether Ms. Self can do so.

(Doc. 129 at p. 11 (quoting Doc. 126 at 3)). Not only is Cingular's current position contrary to the position it has taken previously, and thus, potentially judicially estopped; but, as set forth in discussion of the FCC's motion to dismiss, *supra,* Cingular's current position is simply a

hypothetical. Cingular has offered nothing to establish that Self may be able to establish a claim for which the FCC and USAC may be liable to Cingular independent of the FCC's order. The court wholly agrees with USAC in its assertion that

> [i]f Self recovers against Cingular under a federal claim "independent of" FCC rules and regulations, then it necessarily follows that USAC would have no liability to Cingular based on Plaintiff's recovery *because Plaintiff's recovery would not have had anything to do with an action by USAC (or the FCC).*

(Doc. 129 at 12) (emphasis in original). As such, Cingular has failed to state a claim against USAC or the FCC in her amended third-party complaint, thereby warranting dismissal of Cingular's third-party action.[7]

CONCLUSION

For the foregoing reasons, the court finds that Cingular's amended third-party complaint fails to state a claim against either the FCC or USAC. As such, Cingular's amended third-party complaint is due to be dismissed without prejudice.[8] A separate order will be entered contemporaneously herewith.

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[7]USAC also argues that the court could not exercise supplemental jurisdiction over Cingular's third-party claims because supplemental jurisdiction is limited by 28 U.S.C. § 2342(1), which grants exclusive jurisdiction to hear appeals of FCC decisions to the court of appeals. (Doc. 129 at pp. 15-17). Because the court has already determined that Cingular's amended third-party complaint is due to be dismissed, it need not address supplemental jurisdiction at this juncture. Should Self establish claims for which USAC and the FCC may be derivatively liable to Cingular, Cingular may assert its derivative claims at that time.

USAC's final argument, with which the court also agrees (see herein at pp. 11-12), is that Cingular has failed to exhaust its administrative remedies (see doc. 129 at 17-19).

[8]"[I]n the absence of subject matter jurisdiction there can be no preclusive findings or conclusions on the merits, and dismissal for lack of jurisdiction is without prejudice." *Lewis v. United States*, 70 F.3d 597, 603 (Fed. Cir. 1995) (a jurisdictional dismissal is not *res judicata*); *Wheeler v. United States*, 11 F.3d 156, 159-60 (Fed. Cir. 1993); *Burnside-Ott Aviation Training Ctr., Inc. v. United States*, 985 F.2d 1574, 1580-81 (Fed. Cir. 1993).

DONE, this the 29th day of September, 2006.

John E. Ott

JOHN E. OTT
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

MARTHA SELF, Plaintiff, v. BELLSOUTH MOBILITY, INC., a corporation, Defendant and Third-Party Plaintiff, v. FEDERAL COMMUNICATIONS COMMISSION and UNIVERSAL SERVICE ADMINISTRATIVE COMPANY, Third-Party Defendants.	)	2:98-cv-02581-JEO

ORDER

In accordance with the Memorandum Opinion entered contemporaneously herewith, the motions of third-party defendants Federal Communications Commission (doc. 122) and Universal Services Administrative Company (doc. 120) to dismiss the amended third-party complaint of defendant/third-party plaintiff Cingular Wireless, LLC, for itself and as successor in interest to BellSouth Mobility, LLC, BellSouth Mobility, Inc., and American Cellular Communications Corporation (collectively "Cingular") are hereby **GRANTED**. Cingular's amended third-party complaint is **DISMISSED WITHOUT PREJUDICE**.

DONE, this the 29th day of September, 2006.

John E. Ott

JOHN E. OTT
United States Magistrate Judge

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20 F.C.C.R. 1012, 20 FCC Rcd. 1012, 2004 WL 2848147 (F.C.C.)

Federal Communications Commission (F.C.C.)

Order

**1 IN THE MATTER OF FEDERAL-STATE JOINT BOARD ON UNIVERSAL SERVICE

CC Docket No. 96-45

1998 BIENNIAL REGULATORY REVIEW - STREAMLINED CONTRIBUTOR REPORTING REQUIREMENTS ASSOCIATED WITH ADMINISTRATION OF TELECOMMUNICATIONS RELAY SERVICE, NORTH AMERICAN NUMBERING PLAN, LOCAL NUMBER PORTABILITY, AND UNIVERSAL SERVICE SUPPORT MECHANISMS

CC Docket No. 98-171

CHANGES TO THE BOARD OF DIRECTORS OF THE NATIONAL EXCHANGE CARRIER ASSOCIATIONS, INC.

CC Docket No. 97-21
DA 04-3669

Adopted: November 19, 2004

Released: December 9, 2004

*1012 By the Chief, Wireline Competition Bureau:

I. INTRODUCTION

1. In this Order, the Wireline Competition Bureau (Bureau) modifies the deadline for filing revisions to the annual Telecommunications Reporting Worksheet (Worksheet or Form 499-A). In addition, we update the Instructions to the Telecommunications Reporting Worksheet, FCC Form 499-A (Instructions), to clarify our intention to reject as untimely any Form 499-A revised filing not submitted within twelve months of the due date of the original filing in question, if the revision would decrease regulatory fees or contributions to support mechanisms for universal service, interstate Telecommunications Relay Service, number administration, or local number portability. With regard to universal service contributions, several parties (Petitioners) have filed requests for review of decisions by the Universal Service Administrative Company (USAC) rejecting revised Worksheet filings as untimely under USAC's processing guidelines.[FN1] We grant such requests and remand them to USAC for consideration as provided in this Order. We also direct USAC to consider, as provided in this Order, any revised Form 499-A filings that are pending before it on the release date of this Order, or that it receives between the release date of this Order and the effective date of this Order.

*1013 2. Adoption of a firm deadline for filing revisions to the Worksheet will help ensure the stability and sufficiency of the federal universal service fund, as contemplated in section 254(d) of the Communications Act of 1934, as amended (the Act).[FN2] We also find that a firm deadline for revised Worksheets will improve the integrity of the universal service contribution methodology and promote efficiency in administration of support mechanisms for universal service, interstate Telecommunications Relay Service, the North American Numbering Plan and Local Number Portability, consistent with the Commission's rules and policies.

II. BACKGROUND

3. The Form 499-A collects information that is used to assess regulatory fees and contributions to federal universal service, interstate Telecommunications Relay Service (TRS), administration of the North American Numbering Plan (NANP), and shared costs of local number portability (LNP).[FN3] In addition, all telecommunications carriers providing interstate telecommunications service must register using the Form 499-A, and all common carriers use the Form 499-A to designate agents in the District of Columbia for service of process.[FN4]

A. Universal Service

**2 4. Pursuant to section 254 of the Act, all telecom-

munications carriers providing interstate telecommunications services and certain other providers of interstate telecommunications are required to contribute to the federal universal service support mechanisms.[FN5] Currently, contributions to universal service are based on a percentage of contributor-provided projections of collected interstate and international end-user telecommunications revenues.[FN6] This percentage is called the contribution factor. ***1014** The Commission determines the contribution factor each quarter.[FN7]

5. The Commission has designated USAC as the neutral entity responsible for administering the universal service support mechanisms, including billing contributors, collecting contributions to the universal service support mechanisms, and disbursing universal service support funds.[FN8] Consistent with section 54.711 of the Commission's rules, contributions are calculated and filed in accordance with the Worksheet, which sets forth information that the contributor must submit to USAC on a quarterly and annual basis.[FN9] Contributors must file a Form 499-A on April 1 of each year to report their annual revenues from the previous year and file a Form 499-Q on a quarterly basis, on the first day of February, May, August, and November, to report their revenues from the prior quarter and their projections of revenues for the upcoming quarter.[FN10] Prior to 2003,[FN11] contributors used the Form 499-Q only to report their revenues from the prior quarter.[FN12] The Form 499-Q is only used for universal service contribution purposes. Any entities that have universal service contributions totaling less than $10,000 within a particular year are not required to submit universal service contributions, although they may still have to file Worksheets for purposes other than universal service.[FN13]

6. If a contributor discovers errors in a Form 499-Q, the contributor may file a revised Form 499-Q. As of April 2003, revised Form 499-Q filings are due within 45 days of the original filing date.[FN14] Prior to April 2003, revised Form 499-Q filings had to be submitted by the filing date for the next Form 499-Q filing.[FN15] The contributor may also true-up errors from Form 499-Qs when it files the Form 499-A the following year.[FN16] If a contributor discovers errors in a Form 499-A, however, the contributor must ***1015** submit a revised Form 499-A by December 1 of the same filing year.[FN17] If there is good cause to go beyond the December 1 deadline, a carrier may file a revision late if the revision is accompanied by an explanation of the cause for the change, along with complete documentation showing how the revised figures derive from corporate financial records.[FN18]

7. To improve the accuracy of the revenues reported, the USAC Board of Directors authorized USAC to allow contributors to file new or revised Form 499-As after the original due date for a period of up to twelve months, *i.e.,* March 31 of the subsequent year.[FN19] According to its processing guidelines, USAC will not accept a revised Form 499-A beyond one year after the original filing deadline if the revision would reduce a contributor's universal service obligation.

B. TRS, NANP, LNP, and Regulatory Fees

****3** 8. Contributions to support the interstate TRS fund are calculated using interstate end-user telecommunications revenue for the prior year multiplied by a contribution factor determined annually by the Commission.[FN20] The minimum annual contribution to the interstate TRS fund is $25.00.[FN21] Contributions to numbering administration are a product of a contributor's end-user telecommunications revenues for the prior year multiplied by a contribution factor determined annually by the Commission.[FN22] The minimum annual contribution to the NANP is $25.00.[FN23] The shared costs of LNP are funded by contributions from all telecommunications carriers providing telecommunications service in areas served by a particular regional database.[FN24] Part of these LNP contributions come from assessments on intrastate, interstate, or international revenue earned from providing telecommunications service in areas served by a particular regional database.[FN25] Finally, interstate telecommunications providers are required to pay annual regulatory fees based on interstate and international end-user revenues multiplied by a fee factor. If the regulatory fee amount is less than $10, the entity is exempt from payment of these fees.[FN26] In all the above cases, relevant revenues are reported on the Form 499-A.[FN27]

***1016 C. Delegated Authority**

9. In the *Second Order on Reconsideration*, the Commission delegated authority to the Bureau to waive, reduce, or eliminate the contributor reporting requirements associated with the universal service support mechanisms.[FN28] In a subsequent order, the Commission clarified that this delegation also authorizes the Bureau to "modify" contributor reporting requirements for the TRS, NANP, and LNP funds and to make future changes to the Telecommunications Reporting Worksheet.[FN29] Accordingly, the Commission amended section 54.711(c) to allow the Bureau to "waive, reduce, modify, or eliminate reporting requirements that prove unnecessary and require additional reporting requirements that the Bureau deems necessary to the sound and efficient administration of the universal service support mechanisms." The Commission reaffirmed that this delegation extends only to making changes to the administrative aspects of the reporting requirements, such as "where and when worksheets are filed," and not to the substance of the underlying programs.[FN30]

III. DISCUSSION

10. In this Order, we modify the Form 499-A Instructions by changing the deadline for contributors to file revised Form 499-As that would result in decreased contribution amounts.[FN31] We adopt a twelve-month deadline for filing revisions to the Form 499-A which would result in a decreased contribution amount.[FN32] Accordingly, any revised 499-A that would result in decreased contributions must be submitted by March 31 of the year after the original filing due date. The prior Instructions required revisions within nine months and contemplated the potential for revisions beyond that time period if there was good cause for the delay in filing and an explanation justifying the change. For the reasons described below, however, we now find that a firm twelve-month deadline for revisions that would result in reduced contributions will improve administrative efficiency and certainty for the contribution systems for universal service, TRS, NANP, and LNP. We conclude that adoption of a firm deadline for filing such revisions to the Worksheet will help ensure the stability and sufficiency of the federal universal service fund, as contemplated in section 254(d) of the Act, as well as the funds for TRS, NANP, and ***1017** LNP.[FN33] In addition, we find that a firm deadline for revised Worksheets will improve the integrity of the universal service contribution methodology and promote efficiency in administration of the universal service support mechanisms, consistent with the Commission's rules and policies. Our actions today will allow USAC and other fund administrators to reduce substantially the need for adjustments regarding a given contribution year, providing certainty to contributors and their customers.

***4** 11. In our experience, twelve months is a sufficient period of time for contributors to revise their 499-A filings for the purpose of reducing their contribution obligations. With regard to universal service contributions, as discussed above, the quarterly-filed 499-Q contains information about both projected revenue for the upcoming quarter and actual revenue for the past quarter. Each 499-Q filing provides an opportunity to report actual revenue information from the prior quarter. On April 1 of each year, carriers file revenue information for the prior year, which helps to determine whether the revenue information in the prior year's 499-Qs was correct. As a result, the 499-A is an opportunity to correct previously-filed revenue information.[FN34] With the new deadline for filing revisions to the Form 499-A, carriers will have a window of one entire year in which to determine whether revenues reported and contribution amounts paid the prior year was too high. Thus, any revised 499-A that is filed by the new deadline represents a third opportunity for carriers to review and file revenue information for the prior year. With regard to TRS, NANP, and LNP contributions, contributors still have two opportunities to review and file revenue information (*i.e.*, in the original 499-A filing and the revised 499-A filing). We find that twelve months is ample time for a diligent filer to determine what revenues it earned the prior year. Setting a twelve-month deadline for filing revisions to the 499-A as described herein gives contributors adequate time to discover errors, while providing incentive to submit accurate revenue information in a timely manner. We note that this Order will have minimal impact on the payment of regulatory fees because entities pay regulatory fees within four months of the original April 1 Form 499-A submis-

sion, and most entities become aware of any need to file revisions at the time of payment.

12. Form 499-As that are filed after the effective date of this Order will be subject to the twelve-month deadline. Thus, contributors will be required to submit revisions to the Form 499-A within twelve months of the original filing deadline, *i.e.*, March 31 of the subsequent year. [FN35] Revised Form 499-As that are submitted after the revision deadline will be rejected by USAC as untimely. Because this Order will become effective after the filing deadline for the 2004 Form 499-A (which was April 1, 2004), contributors will be permitted to submit revisions to the 2004 Form 499-A up to twelve months following the effective date of this Order.

13. As explained above, several Petitioners have filed requests for review of decisions by the Universal Service Administrative Company (USAC) rejecting revised Worksheet filings as untimely under USAC's processing guidelines.[FN36] Because the decision we adopt today does not take effect until thirty days after publication in the Federal Register, these requests (and any other pending requests filed before the effective date of this Order) are subject to the standard currently in effect. Although this Order adopts USAC's one-year deadline for the above-stated reasons, we grant the pending requests for review to allow USAC to consider if there was good cause to allow revisions beyond the deadline ***1018** contained in the Instructions. We remand these requests to USAC and direct USAC to revise universal service contribution obligations as appropriate provided that: (1) the Petitioner has demonstrated good cause for submitting the revision beyond the one-year revision window; and (2) the Petitioner has provided "an explanation of the cause for the change along with complete documentation showing how the revised figures derive from corporate financial records." [FN37] That is, USAC shall only revise contribution obligations to the extent that the carrier has provided accurate and legitimate reasons for filing late and for revising the obligation, in accordance with the existing Worksheet Instructions. The Petitioners are permitted to supplement their filings to USAC as necessary between the release date of this Order and the effective date of this Order. To the extent that a request for review encompasses issues in addition to revised 499-A issues, we remand to USAC only the portion of the request that deals with revised 499-A filings, and retain the remainder of the request for disposition by the Bureau or Commission.

****5** 14. In addition, we direct USAC to consider any similarly-situated revised 499-A filings that it receives between the release date of this Order and the effective date of this Order and to revise universal service contribution obligations in accordance with the above guidelines. In the event that there are pending similarly-situated 499-A revisions that were filed with USAC prior to the release date of this Order, we direct USAC also to consider such filings in accordance with the above guidelines. These filers are permitted to supplement their filings to USAC as necessary between the release date of this Order and the effective date of this Order. All filings that are made to USAC in connection with this Order should be captioned, "ATTN: Form 499-A Revision Order" and sent to the Universal Service Administrative Company, 2000 L Street, N.W., Suite 200, Washington, DC 20036.

IV. ORDERING CLAUSES

15. Accordingly, IT IS ORDERED that, pursuant to authority contained in sections 1, 4, and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151 , 154, 254, and the authority delegated under sections 0.91, 0.291, 1.3, and 54.711 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, 1.3, and 54.711, this Order SHALL BE EFFECTIVE thirty days after publication in the Federal Register.

16. IT IS FURTHER ORDERED that, pursuant to authority contained in sections 1, 4, and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151 , 154, 254, and the authority delegated under sections 0.91, 0.291, 1.3, and 54.711 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, 1.3, and 54.711, the requests for review of decisions by the Universal Service Administrative Company listed in Appendix A are REMANDED to the Universal Service Administrative Company for further review.

***1019** 17. IT IS FURTHER ORDERED that a copy of

this Order SHALL BE transmitted to the Universal Service Administrative Company.

FEDERAL COMMUNICATIONS COMMISSION

Jeffrey J. Carlisle
Chief
Wireline Competition Bureau

FN1. A list of these requests for review is provided in Appendix A to this Order.

FN2. 47 U.S.C. § 254(d). The Communications Act of 1934 was amended by the Telecommunications Act of 1996. *See* Pub. L. No. 104-104, 110 Stat. 56.

FN3. *See* 47 C.F.R. §§ 64.604(c)(5)(iii)(B), 52.17(b), 52.32(b). *See also 1998 Biennial Regulatory Review - Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Service, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms, Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans With Disabilities Act of 1990, Administration of the North American Numbering Plan and North American Numbering Plan Cost Recovery Contribution Factor and Fund Size, Number Resource Optimization, Telephone Number Portability, Truth-in-Billing and Billing Format*, Report and Order, CC Docket Nos. 96-45, 98-171, 90-571, 92-237, 99-200, 95-116, 98-170, FCC 99-175 (rel. July 14, 1999), at para. 1 (*Form Consolidation Order*).

FN4. *See* 47 C.F.R. §§ 64.1195(a), 1.47.

FN5. 47 U.S.C. § 254(d). *See* 47 C.F.R. § 54.706(b).

FN6. *See Federal-State Joint Board on Universal Service, 1998 Biennial Regulatory Review - Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Service, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms, Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans With Disabilities Act of 1990, Administration of the North American Numbering Plan and North American Numbering Plan Cost Recovery Contribution Factor and Fund Size, Number Resource Optimization, Telephone Number Portability, Truth-in-Billing and Billing Format*, Report and Order and Second Further Notice of Proposed Rulemaking, CC Docket Nos. 96-45, 98-171, 90-571, 92-237, 99-200, 95-116, 98-170, 17 FCC Rcd 24952, 24970 (2002) (*Contribution Methodology Order and NPRM*); *see also* 47 C.F.R. § 54.706(b).

FN7. *See* 47 C.F.R. § 54.709(a).

FN8. *See Changes to the Board of Directors of the National Exchange Carrier Association, Inc., Federal-State Joint Board on Universal Service*, Report and Order and Second Order on Reconsideration, CC Docket Nos. 96-45, 97-21, 12 FCC Rcd 18400, 18423-24, para. 41 (1997) (*Second Order on Reconsideration*). *See also* 47 C.F.R. § 54.701.

FN9. 47 C.F.R. § 54.711(a).

FN10. *See* Form 499-A Instructions at 9; Instructions for Completing the Quarterly Worksheet for Filing Contributions to Universal Service Support Mechanisms at 8 (Form 499-Q Instructions). Unless otherwise indicated, all references are to the 2003 version of the Form 499-Q Instructions.

FN11. The requirement in the *Contribution Methodology Order and NPRM* for contributors to report projected revenues in the Form 499-Q became effective January 29, 2003. *See* 67 Fed. Reg. 79525 (2002).

FN12. *Federal-State Joint Board on Universal Service, Petition for Reconsideration filed by AT&T*, Report and Order and Order on Reconsideration, 16 FCC Rcd 5748, 5752 (2001) (*Form 499-Q Order*).

FN13. *See* 47 C.F.R. § 54.708; 499-A Instructions at 5. As explained below, the Worksheet also collects information for assessing regulatory fees and for contributions to interstate telecommunications relay services, administration of the North American Numbering Plan, and shared costs of local number portability administration. *See infra* para. 8. *See also* 499-A Instructions at 3.

FN14. *See* Form 499-Q Instructions at 9.

FN15. *See Form 499-Q Order*, 16 FCC Rcd at 5753, n.22; *see also* 2002 Form 499-Q Instructions at 9.

FN16. *See Form 499-Q Order*, 16 FCC Rcd at 5752-5753, para. 12.

FN17. *See* Form 499-A Instructions at 11.

FN18. *See id.*

FN19. *See* Universal Service Administrative Company, Board of Directors Meeting, July 27, 1999 Minutes. http://www.universalservice.org/board/minutes/board/072799.asp.

FN20. *See* 47 C.F.R. § 64.604(c)(5)(iii)(B).

FN21. *See id.*

FN22. *See* 47 C.F.R. § 52.17(a).

FN23. *See id.*

FN24. *See* 47 C.F.R. § 52.32(a).

FN25. *See* 47 C.F.R. § 52.32(a)(2)(i).

FN26. *See* 47 C.F.R. § 1.1154; *In the Matter of Assessment and Collection of Regulatory Fees for Fiscal Year 2004*, Report and Order, MD Docket No. 04-73, 19 FCC Rcd. 11662, 11714, para. 136 (2004).

FN27. *See* 47 U.S.C. §§ 64.604(c)(5)(iii)(B), 52.17(b), 52.32(b).

FN28. *See Second Order on Reconsideration*, 12 FCC Rcd at 18442. *See also* 47 C.F.R. § 54.711(c). At the time of the delegation, this Bureau was known as the Common Carrier Bureau.

FN29. *See Form Consolidation Order*, FCC 99-175, at para. 40.

FN30. *Id.* at para. 39.

FN31. These changes to the Form 499-A Instructions are procedural, non-substantive changes to the administrative aspects of the reporting requirements. *See JEM Broadcasting Company, Inc. v. Federal Communications Commission*, 22 F.3d 320 (1994) (holding that the Commission's "hard look" rules, permitting amendments to broadcast license applications only during a 30-day window, were procedural and thus, notice and comment was not mandated by the Administrative Procedure Act). Because the changes here are "rules of agency organization, procedure, or practice," we are not required to follow the general procedures for notice and comment of section 553 of the Administrative Procedure Act. *See* 5 U.S.C. § 553(b)(3)(A). For the same reason, the Commission will not send a copy of this Order to Congress and the General Accounting Office pursuant to the Congressional Review Act. *See* 5 U.S.C. § 801(a)(1)(A).

FN32. We note that the Form 499-A replaced Forms 431 (TRS), 457 (universal service), 487 (number portability), 496 (number administration), and that the Form 499-Q replaced the Form 499-S. *See Form Consolidation Order*, FCC 99-175, at para. 6; *Contribution Methodology Order and NPRM*, 17 FCC Rcd at 24952, para. 1. This deadline applies to all prior revenue reporting worksheets, including the Forms 431, 457, 487, 496, and 499-S.

FN33. 47 U.S.C. § 254(d).

FN34. *See, e.g., Contribution Methodology Order and NPRM*, 17 FCC Rcd 24952, 24970, 24973, paras. 32, 36.

FN35. Corresponding revisions regarding filing deadlines will be included in the instructions for the 2005 Form 499-A.

FN36. *See* Appendix A.

FN37. *See* Form 499-A Instructions at 11.

***1020 APPENDIX A**

Requests for Review of USAC Decisions Rejecting Revised Form 499-As

Petitioner	Date Filed
Access One, Inc.	November 23, 2004
Airnex Communications, Inc.	December 4, 2003
Alliance Group Services	October 31, 2001
ARC Networks, Inc.	November 20, 2001
Bright Personal Communications Services, LLC	February 10, 2003
Business Discount Plan, Inc.	March 3, 2003
Cooperative Communications, Inc.	October 3, 2002
Crown Communication, Inc.	July 23, 2002
Dial-Thru, Inc.	February 17, 2004
Eagle Communications, Inc.	November 26, 2003
Equant Inc.	September 25, 2003
Eureka Networks f/k/a Eureka Broadband Corporation	September 30, 2004
GE Business Productivity Solutions, Inc.	July 3, 2002
Griggs County Telephone Company	April 22, 2002
Morris Communications, Inc.	July 12, 2002
New Hope Telephone Company	July 3, 2002
SBC Communications, Inc.	November 9, 2004

SES Americom, Inc. October 27, 2003

Total Communications Services, Inc. September 8, 2003
20 F.C.C.R. 1012, 20 FCC Rcd. 1012, 2004 WL 2848147 (F.C.C.)

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UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA

In re: Pacific Centrex Services Inc., Debtor(s), Pacific Centrex Services Inc. Plaintiff(s), Vs. Universal Service Administration Company Defendant(s).	Case No.: 1:09-bk-17942-MT Adversary No.: 1:09-ap-01516-MT Chapter: 11 **NOTICE OF TENTATIVE RULING** **RE: DEFENDANT'S MOTION TO DISMISS** Date: February 24, 2010 Time: 11:00 AM Location: Courtroom 302

At the hearing, the court adopted the following tentative ruling as its ruling:

Defendant is correct that Plaintiff's opposition was untimely, despite the lengthy response time it was given. Under LBR 9013-1(f), the response should be stricken and the motion granted. As Plaintiff's opposition also fails on tehmerits, however, there is no need to rely solely on this breach to dismiss the complaint.

Defendant Universal Service Administration Company's ("USAC") has filed a motion to dismiss Plaintiff/Debtor Pacific Centrex Services' ("PCS") adversary proceeding complaint on two

grounds: (1) the bankruptcy court does not have subject matter jurisdiction and (2) debtor has failed to exhaust the necessary administrative remedies.

Plaintiff PCS is a California corporation, operating as a debtor-in-possession. PCS filed a Chapter 11 petition on June 26, 2009. Defendant USAC is a nonprofit corporation designated as the administrator of the Universal Service Fund ("USF") established by the Federal Communications Commission ("FCC"). PCS is a telecommunications carrier and is thus required by FCC rules to pay mandatory contributions to USF. As administrator of the USF, USAC is responsible for the collection of contributions to the USF and the distribution of universal service payments from the USF to eligible providers of telecommunications services. USAC collects quarterly interstate and international revenue information from the telecommunications carriers on a quarterly basis and submits this information to the FCC. USAC also calculates and submits the expected contribution factor of each telecommunications carrier. Based upon the information provided by USAC, the FCC establishes a contribution factor for each telecommunications carrier for the upcoming quarter. At the beginning of the quarter to which the contribution factor applies, USAC bills all telecommunications carriers for the amounts due based on the contribution factor applied to the reported revenue of the telecommunication carrier. PCS alleges that during the period commencing October 1, 2002 through June 1, 2009, PCS paid approximately $868,548 to USAC and its collection agents as its contribution to the USF. PCS claims these contribution amounts were based upon erroneous information that was inadvertently provided to USAC by PCS. PCS argues that the amount they should have paid was actually about $540,378, and so therefore that they overpaid approximately $328,170. PCS then filed a complaint for turnover of sum overpaid on December 7, 2009, initiating this adversary proceeding.

USAC claims that under FCC rules, if a carrier submitted erroneous information to USAC which then resulted in an incorrect contribution obligation, that carrier would be required to file a 499-A form correcting the mistake, no later than March 31 of the year following the original filing due date. However, USAC alleges that, although PCS filed the required Form 499-A for 2005, 2006, and 2007, all the forms were untimely as they were all filed on June 24, 2009. Thus, the forms were rejected by USAC, which lead to PCS' filing of this adversary proceeding. USAC also alleges that PCS was required to file an administrative appeal to USAC or to FCC, as required under FCC regulations, before initiating any judicial proceeding. Under FCC rule 47 U.S.C. § 155(c)(4), a person aggrieved by an action of USAC in connection with the administration of the USF is required first to exhaust administrative review, which PCS failed to do.

A federal court must dismiss an action in which there is lack of subject matter jurisdiction. *Arbaugh v. Y&H Corp.*, 546 U.S. 500 (2006). A bankruptcy court has subject matter jurisdiction to "hear and determine all cases under title 11 and all core proceedings arising under title 11." 28 U.S.C. § 157(b)(1). Core proceedings are generally defined as proceedings where the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy. *Kaonohi Ohana, Ltd. v. Sutherland*, 873 F.2d 1302 (9th Cir. 1989). An action is related to bankruptcy if the outcome could alter the debtor's rights, liabilities, options, or freedom of action and which in any way impacts upon the handling and administration of the bankrupt estate. *Id.* Under the bankruptcy code, "orders to turn over property of the estate" are specifically enumerated as core proceedings. 28 U.S.C. § 157(b)(2)(E). However, "the mere characterization of a lawsuit as a proceeding to compel turnover is not dispositive of whether the action constitutes a core proceeding . . . ." *In re World Financial Services Center, Inc.*, 64 B.R. at 986.

PCS has filed its complaint as "a turnover of property to the estate." However, turnover proceedings under 11 U.S.C. § 542 "are not to be used to liquidate disputed contract claims." *In re Charter Co.*, 913 F.2d 1575, 1579 (11th Cir. 1990). Congress intended 11 U.S.C. section 542 to apply to claims for "tangible property and money due to the debtor without dispute which are fully matured and payable on demand." *Id.* Property of the bankruptcy estate is property in which the debtor has "legal or equitable interest as of the commencement of the case." 11 U.S.C. § 541(a)(1). Actions brought, not to obtain *property of* the debtor, but instead seeking to obtain *property owed* to the debtor, cannot be characterized as turnover proceedings. *In Re Kincaid*, 917 F.2d at 1165(9th Cir. 1990).

Trefney v. Bear Stearns Sec. Corp. illustrates the difference between property owed to the debtor versus property which the debtor owns prior to filing bankruptcy, only the latter being the proper subject of a turnover proceeding. 243 B.R. 300, 320 (S.D. Tex. 1999). MBM was a brokerage firm located in Houston, Texas. *Id.* at 304. On November 9, 1992, MBM entered into an Agreement for Securities Clearance Services with Bear Stearns. *Id.* Under the Clearing Agreement, Bear Stearns agreed to act as the clearing broker for MBM's customers. *Id.* As clearing broker, Bear Stearns executed trades ordered by MBM on behalf of MBM's customers. *Id.* In 1996, MBM became insolvent and filed for bankruptcy under Chapter 11. *Id.* at 305. Michael Trefny, appointed as co-trustee to preside over the liquidation of MBM, sued Bear Stearns in an adversary proceeding in the bankruptcy court. *Id.* at 303-04. In the adversary proceeding filed against Bear Stearns, it was alleged that Martinez, the president of MBM, had made unauthorized trades and transfers of money from his customers' accounts into financial accounts that Martinez owned or controlled. *Id.* at 306. Trefny alleged that Bear Stearns was liable for the fraud committed by MBM and its employees and officers, and thus should turn over an alleged $10 million, which Trefny claimed to be the amount of

unauthorized trades and improper transactions made by MBM. *Id.* Bear Stearns heavily contested this allegation and moved in the bankruptcy court to dismiss the adversary proceeding, arguing that the bankruptcy court did not have jurisdiction. *Id.* at 320. Bear Stearns asserted that Trefny's section 542 turnover claim was "hollow" because section 542 applies only when another party is in possession, custody, or control of property of the debtor, and the claim is without dispute. *Id.* The court agreed, holding that because the claims Trefny asserted against Bear Stearns were neither liquidated nor undisputed, Trefny had not asserted a turnover claim under 11 U.S.C. § 542. *Id.*

In contrast, the Ninth Circuit held in *Kincaid* that the debtor's turnover complaint was in fact a core proceeding, and thus the bankruptcy court had jurisdiction to decide the question. *In re Kincaid* , 917 F.2d 1162, 1165 (9th Cir. 1990). Sharon Kincaid was employed by a company that provided a 401(k) Deferred Salary Plan, in which Kincaid had elected to participate. *Id.* at 1163-64. Kincaid declared bankruptcy on December 26, 1985. *Id.* at 1164. At the time of filing, she was still an employee of the Company and had the following interests in the 401(k) Plan: $1,691.74 in basic contributions, $683.96 in supplemental contributions, and $836.03 in matching contributions. *Id.* At the trustee's request, Kincaid applied for withdrawal of contributions. *Id.* The administrator denied the request for withdrawal. *Id.* The bankruptcy court subsequently conducted a hearing on the question, and rendered judgment against the administrator. *Id.* The administrator appealed, contesting the court's jurisdiction. *Id.* The administrator claimed that, contrary to the trustee's argument, the trustee's action did not qualify as a turnover proceeding because Kincaid had no present right to her interest and thus it was not property of the estate. *Id.* at 1165. The court found that the Plan provided Kincaid a discrete account which held a sum in which she had a present, vested interest. *Id.* The money was merely being held in trust by the administrator on Kincaid's behalf and contained

no provision by which Kincaid's interest could ever be distributed. *Id.* Thus, the trustee's action to obtain the interest accrued in the 401-K account was simply a proceeding to force the administrator to turn over something that *belonged to* the debtor, and the bankruptcy court had subject matter jurisdiction. *Id.*

PCS' situation is similar to *Trefney* and distinguishable from *Kincaid*. As in Trefney, where the sum said to be owed to the estate was disputed by Bear Stearns, PCS' claim to approximately $328,170 is heavily disputed by USAC. USAC argues that if PCS was in fact overpaying in contributions to the FCC from 2002 to 2009, PCS was required to notify USAC by filing a 499-A form within the year of every contested payment. Because PCS failed to do so, any alleged overpayment on behalf of PCS is no longer owed to the telecommunications company. As Bear Stearns asserted in *Trefney*, "section 542 applies only when another party is in possession, custody, or control of property of the debtor, and the claim is without dispute." Like Bear Stearns, USAC argues that because PCS is not in custody or control of the property and because the claim is certainly not without dispute, a section 542 turnover proceeding is not the proper filing.

These facts stand in contrast to *Kincaid*. In *Kincaid*, the payments made to the debtor's 401-K plan were held in an account on the debtor's behalf. Unlike the payments made to USAC, which are then deposited in the USF and disbursed to eligible recipient pursuant to federal law, Kincaid's 401-K Plan contained no provision by which Kincaid's interest could ever be distributed. The Plan provided Kincaid a discrete account which held a sum in which she had a present, vested interest. Here, the contested contributions were never held in any type of account on PCS' behalf. Immediately upon receipt, these contributions were dispersed to USF and other eligible recipients. Therefore, where in *Kincaid,* the court held that the trustee's action to obtain the interest from the 401-K plan was "quite simply a proceeding to force the

administrator to turn over something that *belonged to* the debtor," here, the disputed sum PCS' claims to be owed does not in fact belong to PCS. Thus, it is not the proper subject of a turnover proceeding, and this court does not have subject matter jurisdiction to hear the adversary complaint.

USAC's proposed second ground for dismissal is PCS' failure to file an administrative appeal to USAC or the FCC before filing the adversary proceeding. USAC argues that because the debtor did not exhaust administrative remedies to correct the alleged error, the case must be dismissed. Exhaustion of administrative remedies is generally required as a matter of preventing premature interference with agency processes, so that the agency may function efficiently, and so that it may have an opportunity to correct its own errors, to afford the parties and the courts the benefit and expertise, and to compile a record which is adequate for judicial review. *Weinberger v. Salfi*, 422 U.S. 749, 765 (1979). Under the regulatory scheme promulgated by the FCC for the administration of the universal service support mechanisms, a person aggrieved by an action of USAC in connection with administration of the USF is required first to exhaust administrative review. See 47 U.S.C. § 155(c)(7). Moreover, section 405 of the Communications Act prohibits judicial review of an issue upon which the FCC has had no opportunity to pass. 47 U.S.C. § 405. However, the Ninth Circuit has created a narrow exception to the requirement of exhausting administrative remedies; where there is an independent basis for bankruptcy court jurisdiction, exhaustion of administrative remedies pursuant to other jurisdictional statutes is not required. *Town & Country,* 963 F.2d at 1154.

Town & Country illustrates when a bankruptcy court has the ability to assert jurisdiction in a case where the debtor would normally have had to exhaust administrative remedies first. Town & Country ("T&C") was a provider of in-home nursing services under the Medicare Act. *Id.* at 1147. Under the Act, health care providers such as T&C were reimbursed by the

government, usually through Fiscal intermediaries like Blue Cross. *Id.* at 1147-48. If a provider disputed the intermediary's final determination, the provider could request a hearing before the Provider Reimbursement Board within 180 days. *Id.* at 1148. According to the Medicare Act, only after exhausting these procedures could the provider seek judicial review of the final agency decision. *Id.*

In late 1984, Blue Cross asserted that T&C had been overpaid approximately $555,000 for fiscal years 1982 to 1984. *Id.* To resolve the overpayment dispute, T&C executed a promissory note made payable to the government and required $16,835 minimum monthly installments. *Id.* From November 1984 through September 1985, Blue Cross offset approximately $21,000 per month against provider payments. *Id.* However, it was later determined that Blue Cross had only overpaid T&C by $250,000. On July 19, 1985, T&C declared bankruptcy under Chapter 11. *Id.* After the petition was filed, Blue Cross continued to offset post-petition payments otherwise due and payable to the debtor against alleged pre-petition overpayments made to the debtor. Approximately $88, 700 was deducted from provider payments after T&C filed its Chapter 11 petition. *Id.*

In 1986, T&C initiated an adversary proceeding against Blue Cross seeking relief under the federal bankruptcy code to prevent further offsetting and recover the prior post-petition offset payments. *Id.* Defendants moved to dismiss for lack of jurisdiction. *Id.* The Ninth Circuit held that the bankruptcy court had jurisdiction over this adversary proceeding. *Id.* at 1154. The court held that the bankruptcy court had a separate and distinct basis for exercising jurisdiction because T&C's adversary proceeding related to property of the estate and thus was a core proceeding under 28 U.S.C. § 157(b). *Id.* The court concluded that "where there is an independent basis for bankruptcy court jurisdiction, exhaustion of administrative remedies pursuant to other jurisdictional statutes is not required." *Id.* Here, since the proceeding related

to the property of the estate and turnover of such property, the bankruptcy court had an independent basis for jurisdiction under 28 U.S.C. §157(b), and thus T&C did not have to exhaust administrative remedies before filing their adversary proceeding.

Debtor's situation is distinguishable from *Town and Country*. Like the Medicare requirements for exhaustion of administrative remedies in the T&C case, PCS was required to exhaust administrative appeals to the FCC before filing its action in federal court. Unlike the adversary proceeding complaint filed by T&C, which asserted an independent basis for jurisdiction in the bankruptcy court, PCS has not stated grounds which would allow the bankruptcy court to assert separate and distinct jurisdiction. Because the sum is disputed by USAC, the complaint cannot be classified as a turnover proceeding and thus would not be considered a core proceeding under 28 U.S.C. § 157. Although *Town & Country* involved a similar set of circumstances as the case at hand, an overpayment of funds by one party to the other, the amount of overpayment was undisputed and it was clear that T&C was entitled to the offsets taken from its post-petition payments. Because of this fact, it was a simple turnover proceeding and the bankruptcy court had jurisdiction. Here, the sum is disputed, which creates an entirely different scenario and prevents the court from exercising a distinct and separate jurisdiction. Thus, unlike T&C, PCS was required to exhaust administrative remedies.

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The adversary proceeding filed by PCS will be dismissed.

DATED: March 2, 2010

United States Bankruptcy Judge

NOTE TO USERS OF THIS FORM:

1) Attach this form to the last page of a proposed Order or Judgment. Do not file as a separate document.
2) The title of the judgment or order and all service information must be filled in by the party lodging the order.
3) **Category I.** below: The United States trustee and case trustee (if any) will always be in this category.
4) **Category II.** below: List ONLY addresses for debtor (and attorney), movant (or attorney) and person/entity (or attorney) who filed an opposition to the requested relief. DO NOT list an address if person/entity is listed in category I.

NOTICE OF ENTERED ORDER AND SERVICE LIST

Notice is given by the court that a judgment or order entitled (*specify*) **NOTICE OF TENTATIVE RULING**

RE: DEFENDANT'S MOTION TO DISMISS

was entered on the date indicated as "Entered" on the first page of this judgment or order and will be served in the manner indicated below:

I. SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING ("NEF") – Pursuant to controlling General Order(s) and Local Bankruptcy Rule(s), the foregoing document was served on the following person(s) by the court via NEF and hyperlink to the judgment or order. As of_____, the following person(s) are currently on the Electronic Mail Notice List for this bankruptcy case or adversary proceeding to receive NEF transmission at the email address(es) indicated below.

- Neil M Peretz neil.peretz@usdoj.gov
- United States Trustee (SV) ustpregion16.wh.ecf@usdoj.gov
- Robert M Yaspan ryaspan@yaspanlaw.com, tmenachian@yaspanlaw.com

☐ Service information continued on attached page

II. SERVED BY THE COURT VIA U.S. MAIL: A copy of this notice and a true copy of this judgment or order was sent by U.S. Mail to the following person(s) and/or entity(ies) at the address(es) indicated below:

Harvey I Saferstein
2029 Century Park East Ste 1370
Los Angeles, CA 90067

☐ Service information continued on attached page

III. TO BE SERVED BY THE LODGING PARTY: Within 72 hours after receipt of a copy of this judgment or order which bears an "Entered" stamp, the party lodging the judgment or order will serve a complete copy bearing an "Entered" stamp by U.S. Mail, overnight mail, facsimile transmission or email and file a proof of service of the entered order on the following person(s) and/or entity(ies) at the address(es), facsimile transmission number(s) and/or email address(es) indicated below:

☐ Service information continued on attached page

EXHIBIT A

USAC
Universal Service Administrative Company

By Electronic and Certified Mail

April 8, 2011

Mr. Richard Lewis
Chief Financial Officer
UTEX Communications Corp
1250 S Capital of Texas Hwy; Bldg 2-235
West Lake Hills, TX 78746

Re: UTEX Communications Corp (Filer ID 825102)
Rejection of 2009 FCC Form 499-A

Dear Mr. Lewis:

On July 6, 2009, UTEX filed a revised 2009 FCC Form 499-A updating its originally filed 2008 calendar year revenue. For the reasons stated below, USAC has rejected this filing, and has reversed USAC invoice transactions associated with this filing on the March 2011 USAC invoice.

On March 31, 2009 UTEX filed its 2009 FCC Form 499-A reporting calendar year 2008 revenues. Block 4 of the form included a gross universal service contribution base amount of $1,212,847, of which $1,203,352 was interstate and subject to federal universal service contribution obligations. This amount was comprised of total local private line revenue on line 406 of $1,093,253, with $1,083,758 interstate, and total federal or state universal service recovery revenue on line 403 of $119,594, with 100% interstate. Block 3 of the form included $205,215 of carrier's carrier revenue not subject to federal universal service contribution obligations. The revenue reported was comparable to prior Form 499-A filings as well as the revenue forecasted on UTEX's previous year's Form 499-Q filings.[1] USAC reviewed and approved this form on April 14, 2009.

On July 6, 2009, UTEX filed a revised 2009 FCC Form 499-A. Block 4 of the form included a gross federal universal service contribution base amount of only $129,089, of which $119,594 was interstate and subject to federal universal service contribution obligations. This amount was comprised of $9,495 in local private line revenues, none of which were allocated as interstate and subject to federal universal service contribution obligations, and $119,594 in federal or state universal service recovery revenue. Block 3 of the form included $1,276,973 of carrier's carrier revenue not subject to federal universal service contribution obligations. During USAC's standard review of UTEX's revised filing, the large shift in revenues from block 4 (End-User) to block 3 (Carrier's

[1] The total forecasted revenues reported on line 120 of UTEX's Nov. '07, Feb. '08, May '08 and Aug. '08 FCC Form 499-Q filings was $1,195,334, resulting in a less than 1% difference between UTEX's 2009 Form 499-A and Form 499-Q filings.

Carrier)[2] prompted USAC's outreach to UTEX seeking explanations for the following issues:

- The large shift of revenues between carrier's carrier revenues reported in block 3 and end-user revenues reported in block 4 from UTEX's originally filed 2009 Form 499-A to UTEX's revised 2009 Form 499-A.
- The $119,594 in federal universal service pass-through charges billed on only $9,495 in end-user private line revenues.
- Verification that 100% of the $9,495 in end-user private line revenue was intrastate.

USAC first emailed UTEX about these issues on August 11, 2009.[3] USAC again requested explanations to the above mentioned issues on a conference call with representatives from UTEX, including Joe Martinec on June 4, 2010. USAC followed up with another email on June 8, 2010.[4] In an email dated June 26, 2010[5] Mr. Martinec stated:

> "The information you've requested below is being gathered. However, I am in the middle of drafting a disclosure statement and plan. My need for broader information is taxing the support staff of the Debtor, but I should be through in a few days. Unfortunately the email you attached was not discovered until we went back through emails after receiving this copy. I think that when it was received it was not recognized as a specific inquiry. It would have been acted on immediately otherwise."

As of the date of this letter, USAC has received no further response to USAC's questions about the 2009 499-A revision.

To correct any discrepancies between a company's forecasts on its Form 499-Q filings and its actual revenues reported on the corresponding Form 499-A, USAC performs the annual A/Q True Up. UTEX's 2009 A/Q True Up was calculated based on the revenues reported on UTEX's revised 2009 Form 499-A filing. Because the revenue reported on UTEX's revised 2009 499-A form was less than the projected revenue on UTEX's corresponding 499-Q forms, the A/Q True-up process generated credits in the amount of $104,023.11. These credits were split evenly across UTEX's 3rd quarter 2009 invoices. UTEX filed for Chapter 11 bankruptcy protection on March 31, 2010, making 100% of the true-up credits pre-petition. Those credits were included in a pre-petition Proof of Claim, filed with the United States Bankruptcy Court for the Western District of Texas in May 2010.

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[2] 99% of UTEX's end-user telecommunication revenues were reclassified as federal universal service contribution exempt revenues on UTEX's revised 499-A Filing.
[3] Email from USAC to Richard Lewis, rlewis@worldcall.net (August 11, 2009, 11:44 a.m.).
[4] Email from USAC to Richard Lewis and Joe Martinec, rich@worldcall.net, martinec@mwvmlaw.com (June 8, 2010, 9:02 a.m.).
[5] Email from Joe Martinec to USAC (June 21, 2010, 4:23 p.m.).

Because UTEX's revised 2009 Form 499-A filing appears to vary significantly from its prior filings, and because of UTEX's repeated non-response to USAC's inquiries concerning the filing, USAC has rejected UTEX's revised 2009 499-A filing submitted on July 6, 2009. USAC has reversed the resulting A/Q True-up credits on UTEX's March 2011 USAC invoice by way of adjustment line items totaling $104,023.11.[6] USAC has also reinstated the original 2009 Form 499-A filed by UTEX, and will apply the recalculated A/Q True-up totaling charges of $816.91 in three installments across the 2nd quarter of 2011. These billing adjustments will be applied to the pre-petition period, increasing the pre-petition balance from a credit of ($131,995.57) to a credit of ($27,155.55).

If you have information to support your revised 2009 Form 499-A form, you must submit support of that in writing to USAC no later than 30 calendar days from the date of this letter to the following address:

USAC
Attn: General Counsel
2000 L Street NW, Suite 200
Washington, DC 20036

If you wish to appeal this decision, detailed instructions for filing appeals are available at: http://www.universalservice.org/fund-administration/contributors/file-appeal

Sincerely,

Michelle Garber
Director of Financial Operations
USAC

[6] USAC Invoice UBDI0000478330, March 22, 2011.

EXHIBIT B

UTEX Communications Corp. d/b/a FeatureGroup IP

W. Scott McCollough
General Counsel

1250 S Capital of Texas Hwy
Bldg 2-235
West Lake Hills, Texas 78746

512.[illegible]2 (V)
512.692.2252 (FAX)
scott@worldcall.net

April 27, 2011

Mike Lawrence
Collections Manager
UNIVERSAL SERVICE ADMINISTRATIVE COMPANY
2000 L Street, NW, Suite 200
Washington, DC 20036

Email: mlawrence@usac.org
FAX: (202)776-0800

USAC
Attn: General Counsel
2000 L Street NW, Suite 200
Washington, DC 20036

Michelle Garber
Director of Financial Operations
USAC
2000 L Street NW, Suite 200
Washington, DC 20036

RE: 2009 FCC Form 499-A Rejection

Dear Mr. Lawrence:

UTEX Communications Corp. d/b/a FeatureGroup IP ("FeatureGroup IP") received your April, 2011 email and attached letter addressed to Richard Lewis, our CFO. Please accept this as our response.

Your letter states that USAC has "rejected" FeatureGroup IP's revised 2009 499-A, relating to 2008 revenue and has "reversed the resulting A/Q True-up credits on UTEX's March 2011 USAC invoice by way of adjustment line items totaling $104,023.11." The letter goes on to state that "USAC has also reinstated the original 2009 499-A Form filed by UTEX, and will apply the recalculated A/Q True-up totaling charges of $816.91 in three installments across the 2nd quarter of 2011." It concludes by asserting that USAC has unilaterally applied the "billing adjustments" "to the pre-petition period, increasing the pre-petition balance from a credit of ($131,995.57) to a credit of ($27,155.55.) FeatureGroup IP does not necessarily accept any of the calculations underlying the letter, and we believe USAC may not be taking all of the facts in its possession into account as part of its calculation. We are merely restating them as they are presented.

Your letter recognizes FeatureGroup IP is presently in bankruptcy as a debtor-in-possession, and that the amounts in issue are for pre-petition amounts owed to

RE: 2009 FCC Form 499-A Rejection

FeatureGroup IP.[1] Your action unilaterally reduces a credit due to FeatureGroup IP by USAC in the form of pre-petition overpayments, and directly impacts "property of the estate." To further confuse things, it does so by adjusting an invoice relating to amounts allegedly owed and payable on a post-petition basis. This violates the automatic stay of 11 U.S.C. § 362 in several serious ways.

USAC owes FeatureGroup IP a significant refund, and this refund is property of FeatureGroup IP's bankruptcy estate. Indeed, prior period restatements understate the amount of the refund only due to the procedures in place at USAC. USAC's online process prohibits amending 499-A filings past one year from original filing – an artificial and arbitrary cutoff. Contrastingly, the Bankruptcy Code contains no such cutoff. FeatureGroup IP will assert a claim for the additional years in addition to the one year arbitrary cutoff imposed by USAC. In addition, FeatureGroup IP disputes that USAC can lawfully impose or attempt to impose interest or penalties, or insist on effectuating any refunds only through credits to future obligations outside the Bankruptcy Court's jurisdiction. Because the regulatory squeeze employed by USAC in coordination with certain ILECs to eliminate competition from CLECs affects several bankruptcy cases, the issue has broad impact.

Although the FCC rules delegated some powers to USAC, some of your demands far exceed your delegated powers and responsibilities. Further, your unilateral action illegally interferes with proper operation and resolution of the bankruptcy case. FeatureGroup IP reserves all rights to have any and all disputes or claims regarding the pre-and post-petition matters relating to the estate resolved by the bankruptcy court.

Notwithstanding FeatureGroup IP's reservations, we provide the following answers on a voluntary basis in an attempt to resolve some of these issues. FeatureGroup IP aspires to work cooperatively with USAC and reach a mutually acceptable result. Failing that, we are willing to consider seeking the FCC's guidance, but as noted FeatureGroup IP reserves all of its rights under the Bankruptcy Code.

Inconsistent and contradictory regulatory commands and determinations as between the FCC and the Texas PUC create a regulatory squeeze for FeatureGroup IP and certain similar competitors. USAC – acting as an agent for the FCC – classifies and treats the underlying revenues in one manner (end user revenues related to telephone exchange service), while the Texas PUC has made determinations that require a different treatment under FeatureGroup IP's tariff (exchange access revenue from contributors, and thus "carrier's carrier" revenues). USAC's decision to reject the Texas PUC's determination and require an inconsistent classification leads regulatory "cost trapping" where FeatureGroup IP is forced to bear all of the adverse consequences of each regulatory system, but reap none of the benefits. This leaves FeatureGroup IP and similarly-situated CLECs with no means to recover the costs imposed on it by the respective regulatory systems. Simply put, the same revenue must be classified consistently by the state and federal entities purporting to implement the same regulatory system.

[1] The letter asserts an incorrect date for the date of the petition in bankruptcy. The petition was filed on March 3, 2010, not March 31, 2010.

RE: 2009 FCC Form 499-A Rejection

FeatureGroup IP, an LEC, prepared the initial reports and remittances based on the Communications Act, the FCC's rules and FeatureGroup IP's federal tariff. Specifically, FeatureGroup IP provided what it reasonably thought was a telephone exchange service to enhanced/information service providers (ESPs). ESP customers were treated as "end users" and the reports included the revenue we received from them as end user revenue. Our revenues were treated for jurisdictional reporting purposes as 100% interstate since our customers' traffic was interstate as a matter of law. When the FCC began imposing a direct USF obligation on Interconnected VoIP providers, we allowed our customers to submit a "resale" certificate that they were a direct contributor, and upon compliance with the rules on independent validation, we treated revenue from those customers as "carriers' carrier" revenue (*e.g.*, not "end user"). Some of our customers took this option, but not all of them did – particularly since some of them do not provide interconnected VoIP service, or not all of their revenue is related to interconnected VoIP service. All of the reports and remittances FeatureGroup IP submitted for several years used this approach, and it was fully consistent with all the rules given the assumptions that were applied.

On June 1, 2009 an arbitrator assigned by the Texas Public Utility Commission issued an "award" in a post-interconnection agreement dispute case between FeatureGroup IP and AT&T Texas, the primary incumbent LEC in Texas.[2] The functional and legal result of the Texas decision, and particularly after applying that decision through the lens of our federal tariff, is that our original assumptions regarding the regulatory classifications of our service, and the services of our customers, and even the identity of our customers, were all rendered incorrect. Our service was functionally deemed to not be telephone exchange service, but instead exchange access service. The award rejected FeatureGroup IP's contentions that the traffic was enhanced/information service traffic from FeatureGroup IP ESP end user customers. Instead, the award found that "most, if not all" of the traffic originated on the PSTN and was "IP-in-the-Middle" traffic, and therefore "telephone toll service" handled by a group of carriers. The award classified the traffic as PSTN-originated based on the presence of a originating traditional telephone number and rated the traffic as "toll" using the telephone rate center associations of the calling and called numbers.[3] The award expressly recognized FeatureGroup IP's rights under its tariff to deem those carriers to be FeatureGroup IP's exchange access customers, and to treat them as such.[4]

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[2] The full Texas Commission later affirmed in part and reversed in part. While the part that was reversed bears on the subject in issue, the order implementing the Texas Commission's decision does not resolve the issue. We strongly disagree with the findings, conclusions and result, and an action seeking review under § 252(e)(6) has been taken to the U.S. District Court for the Western District of Texas. But pending any reversal on appeal, the decision is in effect. We do not intend to provide a comprehensive analysis of the Texas Commission decision in this letter. A copy of the award and the full Texas Commission's later decisions affirming it in part and reversing it in part has already been provided.

[3] On the latter point, the full Texas PUC reversed the Award relating to telephone number based rating, but this part was effectively applied only on a going-forward basis for traffic after September 2007.

[4] We will provide you with references to our tariff upon request. Essentially it provides that any entity that originates telephone toll service traffic and causes it to be delivered to FeatureGroup IP is deemed to be an exchange access customer, and responsible for the resulting exchange access billings.

RE: 2009 FCC Form 499-A Rejection

The effect of the award is that our "customers" were not necessarily the entities we had billed and from whom we had received revenue, but were instead a group of carriers, each of whom is a direct contributor to the fund. In other words, given the Texas PUC's decision all of the revenue we had reported as "end user" was not "end user" after all. Instead, we were deemed to have a completely different set (or at least additional) customers each of which were and are clearly and demonstrably contributors. Therefore, if and to the extent the Texas PUC decision is honored and depending on the precise years the Texas PUC's theory is used, 100% of our revenue is "carriers' carrier." That is why FeatureGroup IP amended its filing and has continued to report in this fashion. Under the Texas PUC award's approach and characterization of the traffic involved, FeatureGroup IP is entitled to a complete refund of all amounts FeatureGroup IP has remitted every year to the fund.[5]

The revised reports and all subsequent reports attempted to implement this consequence, in part. The Texas' PUC's order is not a model of clarity, has some internal inconsistencies and fails to answer seminal questions related to ultimate liability. Further adjustments may need to be made as part of the bankruptcy process.[6] However, until all related matters – the appeal of the Texas PUC decision and the bankruptcy case, FeatureGroup IP asserts that the fund owes the bankruptcy estate a significant refund that must be paid in cash, and the ultimate amount will exceed that presently indicated in our revised prior year 499-A forms. We do not concur with or accede to the unilateral adjustment under either telecommunication law principles or bankruptcy jurisprudence.

To even further complicate matters, at least one of UTEX's telecommunications vendors has now announced that because UTEX is listed as a "non-contributor" it will begin treating UTEX's payments as "end user" and will begin imposing a USF "pass-through" surcharge. Since USAC is appropriating prior credits and applying them to perceived amounts due by UTEX it seems to us that UTEX should at least be deemed a "contributor" if and to the extent your actions remain in effect. On the other hand, if and to the extent the Texas PUC's determinations remain in effect, then all of UTEX's revenues should be "carrier's carrier" and UTEX should be able to so certify to its vendors with the result these vendors would not report UTEX's revenues as "end user." Even though under either theory the amounts UTEX pays to its vendors are not properly subject to assessment, once again UTEX is losing both ways. This kind of regulatory

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[5] The actual revenue amounts for the years between 2005 and 2009 may well change depending on the result of FeatureGroup IP's appeal as well as pending collection actions against the deemed carrier customers in the bankruptcy proceeding and the period in which any revenue adjustments to reflect payment of these claims are booked. Further, the "jurisdiction" may change. If the Texas PUC decision stands then part of the revenues are intrastate switched access and thus not subject to assessment by the federal USF. To date all revenues have been treated as jurisdictionally interstate.

[6] As a single example of the difficulties we face classifying the traffic for regulatory purposes (and thus the identity of the actual customers and therefore the revenue), the full PUC order inconsistently used "numbers" rating for pre-September 2007 traffic but rejects this approach for post-September 2007 traffic. Further, the full PUC order inconsistently accepts the proposition that the pre-September 2007 traffic was subject to access charges but also finds that "some" is "ESP" traffic and *not* PSTN-originated. Finally, there has been no claim by any entity – AT&T or the Texas PUC – that any post-September 2007 traffic was or is PSTN-originated.

squeeze and cost trapping is obviously unreasonable, unlawful, arbitrary and capricious, and UTEX as debtor in possession has a duty to prevent it from occurring.

At the same time, we welcome your collaboration and cooperation; indeed we seek your active assistance in resolving the two apparently conflicting regulatory commands and what appears to be a conflict between the bankruptcy laws and the state and federal regulatory regimes. If USAC wishes to meet and confer so as to exchange additional information and ideas on how this can be sorted out we welcome that as well. Although we do not yet agree to do so, we are also willing to discuss the potential and propriety of using the FCC administrative process to secure a decision by the FCC, at least on an initial basis, subject to ultimate approval, oversight and (if and to the extent it appears reasonable and lawful) implementation of the decision for purposes of FeatureGroup IP's plan of reorganization.

Some of the prior correspondence requested "a list of the company's resellers, including the company name and filer IDs." Some of that information is a matter of public record, some of it has yet to be discovered and some of it we cannot, unfortunately, disclose because it is the subject of a protective order entered by the Texas PUC that is still in force.

The public information is part of the bankruptcy schedules. Please refer to Schedule B2 "OCN Billing Detail." We continue to identify additional companies on occasion, but that is the most current list. To the best of our knowledge and belief, each of the companies on that schedule is a direct contributor to the fund.

Prior correspondence also asks that we "explain the large amount of Federal USF reported on line 403 columns (d) + (e) as it compares to line 420 (d) + (e)." You then go on to note that "[t]elecommunications carriers may not recover their federal universal service contribution costs through a separate line item that includes a mark up above the relevant contribution factor." With regard to the latter, our reports are consistent with 47 C.F.R. 54.712(a). Your characterization of the rule varies significantly from the rule's actual words, but more importantly USAC is not the one that enforces that rule, except perhaps to the extent any amount reported might vary from the amount actually received from end users. Here, the amount reported on the revised form is exactly the amount of pass-through revenue FeatureGroup IP actually received.

FeatureGroup IP suggests that the parties meet and confer on this complicated set of issues. We can attempt to reach a negotiated result that could then be presented to the bankruptcy court for approval and ultimately implementation in the plan of reorganization. Alternatively, we can discuss the appropriate venue and process for resolution by regulatory or judicial authorities. FeatureGroup IP is relatively indifferent to which regulatory theory prevails. But there can and must be only one consistent theory, and the result cannot be that for Texas PUC purposes the traffic is (and the revenues are) considered to be part intrastate and part interstate "exchange access service" to carriers that are contributors while for FCC purposes the traffic is (and the revenues are) treated as 100% interstate end user. Because this issue is critical to the outcome of FeatureGroup IP's reorganization efforts, and because of the regulatory agencies' inability to reach a consistent treatment of this issue, lack of consensual resolution will result in a proceeding in the Bankruptcy Court.

RE: 2009 FCC Form 499-A Rejection

Please contact me with any questions or comments. We look forward to working with you to sort this out in an attempt to avoid litigation.

Sincerely,

W. Scott McCollough
General Counsel
UTEX Communications Corp. d/b/a FeatureGroup IP